No. 97-9361-CFY
CAPITAL CASE

Title: Louis Jones, Petitioner
v.
United States

Docketed:
June 4, 1998

Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jun 2 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 5, 1998)
	Jun 23 1998	Order extending time to file response to petition until August 5, 1998.
	Jul 31 1998	Brief of respondent United States in opposition filed.
	Aug 13 1998	DISTRIBUTED. September 28, 1998
	Sep 8 1998	Reply brief of petitioner Louis Jones filed.
	Sep 25 1998	Supplemental brief of petitioner Louis Jones filed.
	Oct 5 1998	Petition GRANTED. limited to the following questions:1. Whether the petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release. 2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that the deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment. 3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt. SET FOR ARGUMENT February 22, 1999. **********
	Oct 23 1998	Motion of petitioner for appointment of second counsel filed.
	Oct 26 1998	Record filed.
	Nov 2 1998	DISTRIBUTED. November 6, 1998 (Page 14)
	Nov 3 1998	Order extending time to file brief of petitioner on the merits until December 1, 1998.
	Nov 9 1998	Motion of petitioner for appointment of second counsel DENIED.
	Nov 10 1998	Order extending time to file brief of respondent on the merits until January 11, 1999.
	Nov 16 1998	Joint appendix filed.
	Dec 1 1998	Brief of petitioner Louis Jones (TBP) filed.
	Dec 2 1998	Record filed.
	Jan 11 1999	Brief of respondent United States filed.
	Jan 11 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jan 14 1999	CIRCULATED.
	Feb 11 1999	Reply brief of petitioner Louis Jones filed.
	Feb 22 1999	ARGUED.

97-9361

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOUIS JONES, JR.
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Capital Case)

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CAPITAL CASE

QUESTIONS PRESENTED

I. **Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?**

SUBSIDIARY QUESTIONS:

Did the Fifth Circuit err when it held that a deadlocked sentencing jury would result in a new sentencing hearing, contrary to the plain wording of 18 U.S.C. § 3594 and the holding of the United States District Court for the District of Colorado in United States v. Nichols, 1998 WL 2518 (D.Colo., Jan. 7, 1998)?

Is an instruction on the effect of nonunanimity in capital sentencing proceedings required by due process and the Eighth Amendment?

II. **Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?**

SUBSIDIARY QUESTION: Does the erroneous injection of a nonexistent less-than-life sentencing alternative into the sentencing jury's deliberations violate due process under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980), and the Eighth Amendment requirement of reliability in capital sentencings?

III. **Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?**

IV. **Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?**

SUBSIDIARY QUESTION: Under § 3595, must each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOUIS JONES, JR.
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(Capital Case)

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed January 5, 1998, as to which rehearing was denied on March 4, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals, United States v. Louis Jones, Jr., is published at 132 F.3d 232. A copy of the West slip opinion is attached as Appendix A. A copy of the unpublished order of the Fifth Circuit denying rehearing is attached as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 5, 1998. The Court of Appeals denied rehearing on March 4, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 18 U.S.C. § 3291. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3595(a), and 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sentence of death in this case was imposed pursuant to the Federal Death Penalty Act of 1994, which is codified at 18 U.S.C. §§ 3591-3598 (Appendix C). The due process guarantee at issue in the first two questions presented is contained in the Fifth Amendment to the United States Constitution, which is set forth in Appendix D. The first three questions presented also implicate the Eighth Amendment to the United States Constitution, which is set forth in Appendix E.

STATEMENT OF THE CASE

A. Proceedings Below

On March 7, 1995, Petitioner Louis Jones, Jr., was indicted in a two-count indictment charging 1) kidnapping within the special maritime and territorial jurisdiction of the United States, resulting in the death of Tracie Joy McBride, in violation of Title 18, United States Code, Sections 7(3) and 1201(a)(2) (Count 1), and 2) assault of Michael Alan Peacock within the maritime and territorial jurisdiction of the United States, resulting in serious bodily injury, in violation of Title 18, United States Code, Sections 7(3) and 113(f) (Count 2).

On September 13, 1995, the government gave notice of its intention to seek the death penalty in the event Petitioner was convicted of the offense charged in Count 1.

On October 16 through October 23, 1995, Petitioner was tried by jury before the United States District Court for the Northern District of Texas, Lubbock Division. On October 23, 1995, the jury returned a verdict of guilty against Petitioner on both counts.

On October 24 through November 3, 1995, a separate sentencing hearing was held before the same jury that decided guilt/innocence. On November 3, 1995, the jury returned a verdict of death on Count 1, and the District Court entered judgment on that verdict. After a timely motion for new trial was denied, Petitioner filed a timely Notice of Appeal as to the judgment on Count 1.

Meanwhile, the noncapital offense charged in Count 2 proceeded through the usual steps of preparation of a presentence report and objections. On April 12, 1996, the District Court sentenced Petitioner to 57 months imprisonment on Count 2, to run concurrently with any period of confinement Petitioner served while awaiting imposition of the death penalty imposed on Count 1.

The District Court also sentenced Petitioner to two years supervised release. Petitioner filed a timely Notice of Appeal as to the judgment entered on Count 2.

Both appeals were consolidated and heard before the United States Court of Appeals for the Fifth Circuit. That court affirmed Petitioner's convictions and his sentence of death. See United States v. Jones, 132 F.3d 232, 253 (5th Cir. 1998) (Appendix A). The Court of Appeals also denied Petitioner's timely petition for rehearing. See Appendix B.

B. Statement of Relevant Facts

On February 18, 1995, Tracie Joy McBride, a 19 year old white female private stationed at Goodfellow Air Force Base, was kidnapped from a laundry room on base by a black male.[1] Her kidnapping remained unsolved for two weeks until Petitioner became a suspect in the case on March 1, 1995. After being taken into custody on an unrelated charge, Petitioner gave a statement in which he admitted abducting Tracie McBride and taking her to his residence in San Angelo. Petitioner admitted that in the early morning hours of February 19, 1995, he drove McBride to a remote location, where he struck her over the head several times with a tire iron, killing her. He then left her body under a bridge.

After he had made his statement, Petitioner led law enforcement authorities to the location of McBride's body. An autopsy concluded that the cause of McBride's death was blunt force trauma to the head. The autopsy also found vaginal bruises consistent with a sexual assault.

Petitioner's case was the first in the country in which the United States sought to seek the federal death penalty under the then-newly enacted Federal Death Penalty Act of 1994 ("FDPA"),

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[1] While in the process of abducting McBride, this black male also assaulted one Private Michael Peacock, who was attempting to foil the abduction. This assault became the basis of Count 2 against Petitioner.

codified at 18 U.S.C. §§ 3591-3598 (Appendix C). The United States gave notice of its intent to seek the death penalty, and specified four statutory aggravating factors[2] and three nonstatutory aggravating factors[3] which it would attempt to prove in order to qualify Petitioner for the death penalty.

After Petitioner was found guilty of the kidnapping, the case proceeded into the separate sentencing hearing called for by the FDPA. After the government presented its case on aggravation, the defense proceeded to put on an extensive case in mitigation. The defense showed that Petitioner

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[2] These factors -- taken from the list of statutory aggravating factors found in 18 U.S.C. § 3592(c) -- were as follows:

> 2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.
>
> 2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.
>
> 2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.
>
> 2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride.

[3] These factors -- drafted by the prosecutor pursuant to authority purportedly granted in §3592(c) -- were as follows:

> 3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.
>
> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
>
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

had risen from a childhood background of severe physical and sexual abuse and neglect to become a successful noncommissioned officer in the United States Army. During his 22 year Army career, Petitioner served with distinction in the Army Airborne Rangers in both the Grenada conflict and the Gulf War. Petitioner rose through the ranks and was decorated several times.

The defense also showed how Petitioner's life fell apart after Petitioner retired from the Army in 1993 -- which sacrifice he made in order to be together with his then-wife Sandy Lane. After his retirement, Petitioner went from being a highly-regarded, successful military professional, to a series of failed attempts to go back to college, and minimum wage jobs which did not even enable Petitioner to support his family. This decline in Petitioner's fortunes took its toll on his marriage, and eventually destroyed the marriage altogether.

On the critical date -- February 18, 1995 -- Petitioner's ex-wife, Sandy Lane, made a final break with Petitioner, informing him that there was no chance that they could ever have a future together again. Crazed with grief and desperation at the death of his marriage, and under the influence of alcohol, Petitioner went in search of Sandy on base, where he thought she might be on duty. Unfortunately, he found Tracie McBride, who bore a strong physical resemblance to Sandy.

The defense presented extensive expert psychiatric and psychological testimony to show that Petitioner's ability to control his impulses and to act rationally had, on the date of the offense, been severely compromised.[4] The break with Sandy had simply been the trigger which -- coupled with Petitioner's childhood sexual and physical abuse, posttraumatic stress disorder from witnessing killings during combat in Grenada and from stressful combat conditions during the Gulf War with

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[4] Testimony showed that Petitioner suffered from impairment of the frontal lobe of the brain, the part of the brain attributed with rational decisionmaking and impulse control.

numerous physical manifestations, numerous severe head injuries, and the loss of the organizing structure of the Army -- sent Petitioner over the edge.

The jury did not find two of the statutory aggravating factors submitted: 2(B) (that Petitioner caused a grave risk of death to another person) and 2(D) (that Petitioner committed the killing after substantial planning and premeditation). The jury did make an affirmative finding that the other two statutory aggravating factors -- 2(A) and 2(C)[5] -- had been proven beyond a reasonable doubt.

The jury failed to find nonstatutory aggravating factor 3(A); that is, they did not find that Petitioner constituted a future danger to the lives and safety of other persons. The jury did make affirmative findings as to the other two factors, 3(B) and 3(C).[6]

Furthermore, the jury was obviously impressed by Petitioner's mitigation case since one or more jurors found 11 mitigating factors to exist:

1. That Petitioner did not have a significant prior criminal record;

2. That Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law was significantly impaired;

3. That Petitioner committed the offense under severe mental or emotional disturbance;

4. That Petitioner was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed);

5. That Petitioner served his country well in Desert Storm, Grenada, and for 22 years in the United States Army;

6. That Petitioner is likely to be a well-behaved inmate;

7. That Petitioner is remorseful for the crime he committed;

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[5] See footnote 2, supra.

[6] See footnote 3, supra.

8. That Petitioner's daughter will be harmed by the emotional trauma of her father's execution;

9. That Petitioner was under unusual and substantial internally generated duress and stress at the time of the offense;

10. That Petitioner suffered from numerous neurological or psychological disorders at the time of the offense.

Additionally, seven jurors "wrote in" "Sandy Lane" -- Petitioner's ex-wife -- as a mitigating circumstance.

After the jury returned its verdict of death, two events occurred which showed that the jury had labored under a fundamental misunderstanding of the consequences of their actions. First, on November 8, 1995, only five days after the jury returned its verdict, juror Christie Beauregard, who had misgivings about the verdict, contacted the defense and let them know the following facts about what had happened during the jury's deliberations:

1. The jury was originally hung 8-4 in favor of death;

2. The jury believed that if it was hung and unable to produce a unanimous verdict for death or life without release, then the judge would impose a "lesser sentence" on Petitioner -- which no one wanted;

3. The pressure mounted when the vote became 10-2, with only Beauregard and Cassandra Hastings holding out for life; and

4. Succumbing to the pressure of the group -- **and based on their belief that a hung jury would result in a less-than-life sentence for Petitioner** -- Beauregard and Hastings caved in, and voted for death.

Beauregard also indicated that, if the jurors had known that nonunanimity would not result in a less-than-life sentence, she and (she believed) several others would not have agreed to vote for a death sentence. (Beauregard's remarks were memorialized in a sworn affidavit by investigator Daniel Salazar, who, along with one of the defense attorneys, participated in the telephone conversation with Beauregard. Salazar's affidavit is attached at Appendix H.)

Not long after that, juror Cassandra Hastings, who also had misgivings about the verdict, also contacted the defense. As a result, she executed an affidavit which is attached at Appendix I. In addition to corroborating much of what Beauregard had said, Hastings stated that all but three jurors were willing to vote to impose a sentence of life without release on Petitioner. However, the refusal of these three even to consider life without release caused the jury to realize it would be hung.

Like Beauregard, Hastings also changed her vote to death under her belief that jury nonunanimity would result in a less-than-life sentence for Jones. Hastings stated that she would not have changed her vote, had it not been for this mistaken belief.

The remarks of Beauregard and Hastings made it crystal clear that the specter of a "lesser sentence" -- which, this jury believed, would be imposed by the court as the result of a hung sentencing jury -- had been the driving force behind this jury's decision to sentence Petitioner to death.

REASONS FOR GRANTING THE WRIT

I. Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?

SUBSIDIARY QUESTIONS:

Did the Fifth Circuit err when it held that a deadlocked sentencing jury would result in a new sentencing hearing, contrary to the plain wording of 18 U.S.C. § 3594 and the holding of the United States District Court for the District of Colorado in United States v. Nichols, 1998 WL 2518 (D.Colo., Jan. 7, 1998)?

Is an instruction on the effect of nonunanimity in capital sentencing proceedings required by due process and the Eighth Amendment?

In this case, once the jury returned its verdict of guilty on the kidnapping charge against Petitioner, there were only two possible sentencing outcomes: death, or life imprisonment without release or parole. The federal kidnapping statute under which Petitioner was convicted, 18 U.S.C. § 1201, provides that one who commits a kidnapping within the special maritime and territorial jurisdiction of the United States "shall be punished by imprisonment for any term of years or for life

and, **if death results, shall be punished by death or life imprisonment.**" 18 U.S.C. § 1201 (emphasis supplied).

In the trial as to guilt/innocence, the jurors in this case were instructed that, in order to convict Petitioner of the crime charged, they had to find, beyond a reasonable doubt, "[t]hat the death of Tracie Joy McBride resulted [from the kidnapping]." Thus, the jury's verdict of guilty represented a finding, beyond a reasonable doubt, of "death result[ing]," thereby limiting the possible punishments to either death or life imprisonment. A lesser sentence than life imprisonment was no longer a possibility by the time the sentencing hearing began.

Moreover, because parole has been abolished in the federal system[7], and because a person subject to a life sentence is not eligible to receive "good time,"[8] "life imprisonment" means what it says -- that the person will never get out. Therefore, as the jury went into the sentencing hearing, there were only two options: death, or life imprisonment which was, perforce, without the possibility of parole or release.

Furthermore, a "mistrial" and a new sentencing hearing are not permissible options where the sentencing jury "hangs" or deadlocks as to the appropriate punishment. This is made clear by 18 U.S.C. § 3594, which provides in relevant part as follows: "Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.**" 18 U.S.C. § 3594 (emphasis added).

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[7] The provisions for federal parole were repealed effective November 1, 1987, see Pub. L. 98-473, tit. II, ch. II, § 218(a)(5), although the repeal applied only to offenses committed after that effective date. See id. at § 235(a)(1), codified at Historical and Statutory Notes to 18 U.S.C. § 3551.

[8] A prisoner serving "a term of imprisonment for the duration of the prisoner's life" is not eligible for sentence credit for satisfactory behavior. See 18 U.S.C. § 3624(b)(1).

This statute clearly provides that, one way or another -- with jury unanimity or not -- the defendant will receive some kind of sentence after the first sentencing hearing. This reading clearly forecloses the possibility of a "mistrial" and a new sentencing hearing. Thus, under § 3594, as applied to this case, there were only two possible outcomes in this case:

1. Death, upon unanimous vote of the jury for such penalty, see 18 U.S.C. § 3593(e); or
2. Life imprisonment without the possibility of parole or release, either
   a. Upon unanimous vote of the jury for such penalty, see 18 U.S.C. § 3593(e); or
   b. By operation of law under the second sentence of § 3594, by virtue of a nonunanimous jury.

Consequently, a failure by the jury to unanimously vote for the death penalty in this case would have resulted in a sentence of life imprisonment without the possibility of parole or release for Petitioner.[9]

The Fifth Circuit agreed that, in this case, there were realistically only two sentencing alternatives for Petitioner: death, or life without release. Jones, 132 F.3d at 248. However, the Fifth Circuit disagreed with Petitioner's argument about the effect of a nonunanimous sentencing jury:

> . . . [18 U.S.C.] § 3593 [ ] requires unanimity for every sentence rendered by the jury regardless of whether the verdict is death, life without the possibility of release, or, if possible under the substantive criminal statute, any other lesser sentence. Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered. As such, a second

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[9] To be sure, this will not always be the case under § 3594. Many potential death penalty offenses permit alternative penalties of, not only life imprisonment, but also lesser penalties. See, e.g., 18 U.S.C. § 242 (defendant convicted of deprivation of civil rights where death results may be "imprisoned for any term of years or for life ... or may be sentenced to death"); 18 U.S.C. § 844(d) (defendant convicted of killing by explosive "shall be subject to imprisonment to any term of years, or to the death penalty, or to life imprisonment"). The death penalty provisions in 18 U.S.C. § 3591 et seq. were written to accommodate those statutes which do actually permit "lesser sentences" than life imprisonment. Certainly, however, the mention of a "lesser sentence" in the Federal Death Penalty Act was not intended to create a "lesser sentence" option for offenses -- like that at issue here (18 U.S.C. § 1201) -- which expressly permit only death or life imprisonment sentences.

> sentencing hearing would have to be held in front of a second jury impaneled for that purpose. *See* 18 U.S.C. § 3593(b)(2)(C).

Id. at 243; see also id. at 245 ("the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results").

The Fifth Circuit's conclusion is in violation of the clear language of § 3594, which provides in relevant part as follows: "Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.**" 18 U.S.C. § 3594 (emphasis added).

The courts are bound to harmonize § 3593 and § 3594 if they can; and these two provisions can be harmonized in the following fashion: a jury "recommendation" of death or life without release must be unanimous in order for either of these sentences to be imposed on the defendant. The first sentence of § 3594 establishes this. However, in the very next sentence, Congress, by its use of the comprehensive word "[o]therwise," provided that, **in any other eventuality**, "the court shall impose any lesser sentence that is authorized by law." 18 U.S.C. § 3594 cl.2. The case of a deadlocked or hung sentencing jury falls within the second sentence of § 3594. Thus, a deadlocked or hung sentencing jury results in a judge-sentencing of the defendant, not a new sentencing hearing.

The Fifth Circuit's contrary conclusion is not only in violation of the clear language of § 3594; it is also at odds with the only other federal court to have confronted this question. Only a couple of days after the opinion in this case was rendered, the United States District Court for the District of Colorado confronted this very issue in United States v. Terry Lynn Nichols, No. 96-CR-68. In that case, the jury deadlocked as to whether the government had met its burden of proof on the sentencing factors it was required to prove under § 3591(a)(2). After satisfying himself that the jury was hopelessly deadlocked, Chief Judge Matsch dismissed the jury and declared that Nichols

would be sentenced by the court. See Transcript of Proceedings, January 7, 1998, reported at 1998 WL 2518. Chief Judge Matsch held that the jury's failure to achieve unanimity resulted in sentencing by the court. Id. at *4.

The conflict between these holdings of the Fifth Circuit and the United States District Court for the District of Colorado alone warrants this Court's exercise of its certiorari power to decide this case. However, the Fifth Circuit's erroneous conclusion that a deadlocked sentencing jury requires a new sentencing hearing (and does not result in a default sentencing by the court) caused it to decide erroneously another question as to which courts are even more deeply divided.

Because the Fifth Circuit held that nonunanimity would not result in a default life sentence for Petitioner, but rather would result in a "mistrial" and a new sentencing hearing, the Fifth Circuit held that there was no constitutional error in failing to instruct the jury on the consequences of a nonunanimous verdict. Jones, 132 F.3d at 245. The Fifth Circuit noted that in State v. Williams, 392 So.2d 619 (La. 1980) -- on which Petitioner had relied -- the Louisiana Supreme Court had "held that juries must be informed of the consequences of failing to achieve a unanimous verdict." Id.. The Fifth Circuit, however, distinguished that case on the ground that under Louisiana law -- unlike the federal statutes at issue in this case -- a nonunanimous verdict **would** result in a default sentence of life imprisonment. Id.

As pointed out above, this distinction was an erroneous one, since § 3594, as applied in this case, requires that a nonunanimous verdict result in a default sentence of life without release/parole. Thus, this case presents the very issue decided by Williams and a host of other courts. And, a review of that jurisprudence shows that both federal and state courts are deeply divided as to whether the Eighth Amendment requires that a capital sentencing jury be instructed as to the consequences of the failure to reach a unanimous sentencing verdict.

In Williams, the Louisiana Supreme Court held that the trial judge's failure to instruct the jury that a nonunanimous verdict would result in a life sentence without benefit of probation, parole or suspension of sentence, violated the Eighth Amendment:

> In the present case, the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court must impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.
>
> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. **Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action. The death penalty was imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.**

Williams, 392 So.2d at 634-35 (emphasis supplied). The opinion then noted that "[t]he effect of the error here involved must be held to be prejudicial. If only one of the twelve jurors was swayed by the failure to inform him fully of the consequence of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed." Id. at 635. Accordingly, the court reversed the sentence of death and remanded for a new penalty trial. Id.

This opinion in Williams has been followed and applied to overturn death sentences in a number of subsequent similar cases in other jurisdictions. See, e.g., People v. Durre, 690 P.2d 165, 174 (Colo. 1984); Whalen v. State, 492 A.2d 552, 562 (Del. 1985); State v. Ramseur, 106 N.J. 123, 308-312, 524 A.2d 188, 282-84 (1987); People v. Drake, 748 P.2d 1237, 1254-60 (Colo. 1988) (applying Durre); State v. Bey, 112 N.J. 123, 177-181, 548 A.2d 887, 914-16 (1988) (applying Ramseur). Other courts have, however, disagreed with the reasoning and holding of Williams, albeit

with often very little counter-reasoning. See, e.g., Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989) ("No obligation exists for the trial judge to inform the jury of the ultimate result should they fail to reach a verdict.") (citation omitted), cert. denied, 497 U.S. 1010 (1990); Coulter v. State, 438 So.2d 336, 346 (Ala. Crim. App. 1982) ("we can find no [ ] support for appellant's contention, that a defendant in a capital felony case is entitled to have the jury instructed as to the consequences of a 'hung' jury during its punishment deliberations") (collecting cases from Florida, Mississippi, Tennessee, South Carolina, Virginia, and North Carolina).

This deep division of opinion on this important Eighth Amendment issue requires this Court's resolution. Moreover, several Members of this Court have indicated their interest in very similar issues. See Simmons v. South Carolina, 512 U.S. 154, 172-74 (1994) (Souter, J., concurring, joined by Stevens, J.) (would hold that Eighth Amendment requires capital sentencing juries to be told that a defendant is ineligible for parole)[10]; see also Brown v. Texas, ____ U.S. ____, 118 S.Ct. 355, 355-57 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., respecting denial of writ of certiorari) (noting potential constitutional problems of Texas law prohibiting judges from letting capital sentencing juries know when the defendant will become eligible for parole if not sentenced to death). Therefore, this Court should grant certiorari to answer this important question.

Finally, the Fifth Circuit's decision in this case violates due process, as articulated by this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks, a non-capital case, this Court held that, where a statute invested a jury with the sentencing function, the defendant's sentence violated due process where the sentencing jury was not correctly apprised of the sentencing alternatives available to it. Hicks, 447 U.S. at 346-47. Here, while the sentencing jury was told the

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[10] The plurality opinion in Simmons expressly pretermitted the Eighth Amendment issue. See Simmons, 512 U.S. at 162 n.4.

first two sentencing alternatives in this case -- death or life without release, by their unanimous verdict -- the jury was not told, and did not understand, the critical third sentencing alternative -- life without release or parole, imposed by the judge, as a default resulting from the jury's nonunanimity. Because the jury did not fully understand the full ramifications of its sentencing decisions, Petitioner's death sentence violated due process under Hicks. This constitutes yet another reason for this Court to grant certiorari in this case.

For all of these reasons, this Court should grant certiorari to consider the first question presented, along with all of the listed subsidiary questions thereto, and any other questions fairly presented thereby.

II. Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?

SUBSIDIARY QUESTION: Does the erroneous injection of a nonexistent less-than-life sentencing alternative into the sentencing jury's deliberations violate due process under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980), and the Eighth Amendment requirement of reliability in capital sentencings?

The damage from the failure affirmatively to instruct Petitioner's sentencing jury on the consequences of nonunanimity (discussed above) was compounded by jury instructions[11] and verdict forms[12] which erroneously suggested to the jury that failure to unanimously agree on a sentence or death or life without release would result in some "lesser sentence" -- when, in fact, no such "lesser sentence" was even legally possible!

The Fifth Circuit agreed that no "lesser sentence" was possible, and, indeed, held that it was error for the District Court to inform the jury of a "lesser sentence" option. Jones, 132 F.3d at 247-48. However, the Fifth Circuit rejected Petitioner's claim that the instructions and verdict forms created at least a reasonable probability that the sentencing jurors would believe that nonunanimity would result in the imposition of a lesser sentence.[13] Id. at 245-46.

The Fifth Circuit's decision is clearly wrong under the well-established jurisprudence of this Court. In a constitutional challenge to capital sentencing instructions, "a defendant need not establish that the jury was more likely than not to have [construed] the instruction" in an unconstitutional manner. Boyde v. California, 494 U.S. 370, 380 (1990). Rather, it is sufficient that Jones show only a "reasonable likelihood," see Boyde, id., that the jury would have understood the consequence of a lack of unanimity to be a "default" to the "lesser sentence" mentioned in the instructions. Put another way, "[i]f [Petitioner's] interpretation is one that 'a reasonable jury could

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[11] The sentencing jury instructions given in this case are set forth in Appendix F.

[12] The completed sentencing verdict forms in this case are set forth in Appendix G.

[13] The Fifth Circuit also rejected Petitioner's separate claim that the injection of the erroneous lesser sentence alternative violated due process under Hicks v. Oklahoma, on the ground that while this was error under Hicks, such error was not "plain," and hence could not be recognized under the plain error rule of Federal Rule of Criminal Procedure 52(b). Id. at 248. Relying on the fact that no court had previously held that the "lesser sentence" alternative of § 3593 was not available where the substantive statute did not provide for such, the Fifth Circuit concluded that the error was not plain. Id.

have drawn from the instructions given by the trial judge and from the verdict form employed in this case,'" and reversal would be required. United States v. Flores, 63 F.3d 1342, 1375 (5th Cir. 1995), cert. denied, ___ U.S. ___, 117 S.Ct. 87 (1996), quoting Mills v. Maryland, 486 U.S. 367, 375-76 (1988). And, of course, in this federal direct appeal of a death sentence, any question about the instructions should be resolved in Petitioner's favor: "In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948).

In this case, there was **at least** a "reasonable likelihood" that the jury in this case could -- and in fact did -- draw the erroneous interpretation alluded to by Petitioner from the instructions and verdict forms in this case. The instructions and the verdict forms in this case gave the jury the fatally erroneous impression that a lack of unanimity as to either death or life without release would result in the imposition of a fictitious "lesser sentence."

Right after referring to the jury's ability to recommend this nonexistent "lesser sentence," the District Court told the jury, "[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. **That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**" (Emphasis added) The latter sentence certainly implies, if it does not state outright, that the jury's failure to agree on a sentence of death or life without the possibility of release will result in a "default" to the court to impose sentence, and particularly the "lesser sentence" mentioned immediately prior.

Very shortly thereafter, the District Court told the jury, "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." The conspicuous absence of the third

sentencing option thrown out to the jury -- i.e., the "lesser sentence" -- from this statement strongly implies that, in contradistinction to the first two options, the third "lesser sentence" option does **not** require jury unanimity, and hence that option will be the result of nonunanimity.

The same impression is given later in the instructions when the jury was told that "Decision Form B should be used if you **unanimously** recommend that a sentence of death be imposed . . . Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed." (Emphasis added) Here again, the requirement of unanimity, explicitly mandated for the death and life without release options, is conspicuously absent from the option of the "some other lesser sentence" presented on Decision Form D. In light of the omission of the word "unanimously" from the last quoted sentence above, there is at least a reasonable likelihood that the jurors in this case interpreted these instructions to mean that the fictitious "lesser sentence" option, unlike death or life imprisonment without release, did not require unanimity --- and that, therefore, the "lesser sentence" option would be the result of a lack of unanimity.

Such a conclusion is bolstered by the verdict forms in this case. Decision Form B states, "[W]e recommend, **by unanimous vote**, that a sentence of death be imposed," and requires each of the twelve jurors to individually sign his or her name thereto. (Emphasis added) Decision Form C states, "We recommend, **by unanimous verdict**, a sentence of life imprisonment without the possibility of release," and again requires each of the jurors to sign the form individually. (Emphasis added) In stark contrast, Decision Form D states "We the jury recommend some other lesser sentence," with absolutely no mention of unanimity, and requires only the signature of the jury foreperson. Again, the explicit requirement of jury unanimity for death or life without release --

coupled with the conspicuous omission of any mention of unanimity in connection with the "some other lesser sentence" -- would certainly lead a reasonable jury to conclude that the "some other lesser sentence" would be the result of a lack of jury unanimity.

The jury in this case was presented with three sentencing options, two of which explicitly required unanimity every time they were mentioned (death or life without release), and one of which did not (the fictitious "lesser sentence" option). Nor was the jury explicitly told that it had the option of selecting none of these options, and remaining deadlocked. Because "juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so," Mills v. Maryland, 486 U.S. at 383, it seems at least reasonably likely that the jury in this case believed that (1) it had to select at least one of the options; and (2) that the only option available in the case of nonunanimity was the "some other lesser sentence" option, which might result in Petitioner's eventual release from prison some day.[14]

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[14] In Mills, this Court was confronted with an analogous case. A Maryland capital sentencing jury's verdict form stated: "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE." The verdict form then listed the mitigating circumstances one by one, each with a blank marked "yes" or "no." The jury was instructed to weigh only those circumstances marked "yes" against the aggravating circumstances. The petitioner contended that this scheme created a risk that the jury would conclude that it could only consider mitigating circumstances if the jury unanimously found those mitigators, in violation of the precepts of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. Particularly, the petitioner argued that "it was probable, or at least reasonably possible, that the jury understood that a 'no' answer on the verdict form represented a failure to find unanimously the existence of the circumstance, rather than a unanimous determination that the circumstance did not exist." Mills, 486 U.S. at 373; see also id. at 371-373.

The Court agreed, holding that it "[could not] conclude, with any degree of certainty, that the jury did not adopt petitioner's interpretation of the jury instructions and verdict form." Mills, id. at 377-78. The Court noted that "nothing in the verdict form or the judge's instructions even arguably is construable as suggesting the jury could leave an answer blank . . . ." Id. at 379. The Court suggested that, under these circumstances, a failure to unanimously find a mitigator would cause the jury to mark "no" rather than leave the answer blank, thus allowing one juror to preclude the other eleven from considering mitigating evidence to spare the defendant's life. Id. at 379-80.

It should also be noted that the defense foresaw this problem and tendered requested instructions which would have dealt with this problem, at least in this case. Particularly, the defense tendered requested sentencing Instruction # 5, which provided, in relevant part, that

> Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.

Instruction # 5 also provided that

> [i]n the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.

Unfortunately, although the defense orally renewed its request for Instruction # 5 right before closing arguments at the sentencing hearing, the District Court overruled that request.

Under all the circumstances presented here, there is at least a reasonable likelihood that the jury in this case erroneously interpreted the jury instructions and verdict forms to mean that a lack of unanimity would result in an undesirable "lesser sentence" for Petitioner. Indeed, two jurors have stated that the jury in this case **actually** misinterpreted the instructions in the fashion just described.[15]

The same principle is operational here. It is at least reasonably likely that the jury here believed that they were duty-bound to select one of the three sentencing options listed; and that, in the absence of unanimity, the unpalatable "lesser sentence" option would have to be imposed.

[15] These jurors were Christie Beauregard and Cassandra Hastings. Both jurors contacted defense counsel of their own volition. Christie Beauregard's remarks are memorialized in an affidavit prepared by Federal Public Defender investigator Daniel Salazar. Cassandra Hastings herself executed an affidavit. These affidavits are included in Appendices H and I, respectively. Both of these jurors indicated that the jury actually believed that failure to achieve unanimity as to death or life without release would result in a "lesser sentence," which would mean that Petitioner would be released one day. Both Beauregard and Hastings indicated that they changed their votes to death under the erroneous belief that a "lesser sentence" would be the result of jury nonunanimity. Before the jury's consideration of this erroneous premise, the jury was divided 8-4 in favor of the

The erroneous interpretation of the jury instructions and verdict forms in this case gave the death-prone jurors a big stick to wield over the heads of those jurors leaning toward a life sentence. The (in reality nonexistent) threat of nonunanimity resulting in a less-than-life sentence effectively coerced the life-leaning jurors into voting for a death verdict to avoid the more unpalatable (but yet actually nonexistent) option of a less than life sentence.[16] Effectively, the jury was forced into "a false choice between sentencing [Petitioner] to death and sentencing him to a limited period of incarceration." Simmons v. South Carolina, 512 U.S. 154, 161 (1994).

Because Petitioner's interpretation is one that "a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case," reversal of Petitioner's death sentence is required in this case.[17] Mills v. Maryland, 486 U.S. at 375-76. See also Andres v. United States, 333 U.S. 740, 752 (1948) (in federal direct appeal of death sentence, Court held that reversal was required where it was probable that "reasonable men might derive a meaning from the instructions given other than the proper meaning"). This is especially so since "[i]n death cases doubts such as those presented here should be resolved in favor of the accused." Andres, id.

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death penalty, with all but three persons willing at least to consider a life sentence.

[16] Courts have recognized the fearfulness of juries at the prospect "that the defendant may be free to murder again two decades hence." Flores, 63 F.3d at 1369. Cf. O'Dell v. Netherland, ____ U.S. ____, 117 S.Ct. 1969, 1981 (1997) (Stevens, J., dissenting) (recognizing that awareness of availability of life without parole alternative decreases juries' willingness to impose death penalty), Brown v. Texas, 118 S.Ct. at 356 n.2 (recognizing that willingness to impose death penalty decreases as length of parole ineligibility increases).

[17] In addition to all of the foregoing, it must be noted that this was obviously not an easy case for the jury to decide. The verdict of death was rendered only after a day and a half of deliberations, during which the jurors found a significant amount of mitigating evidence to exist.

The erroneous injection of a nonexistent "lesser sentence" alternative -- and the erroneous suggestion that this "lesser sentence" would be the result of jury nonunanimity -- rendered Petitioner's death sentence unreliable and in violation of the Eighth Amendment. Indeed, this Court has taken great pains to stress that the Eighth Amendment is violated by **inaccurate** information about sentencing matters. Compare, e.g., Caldwell v. Mississippi, 472 U.S. 320, 341-43 (1985) (O'Connor, J., concurring in part and concurring in judgment) (casting deciding vote, Justice O'Connor concluded that death sentence violated Eighth Amendment where prosecutor gave sentencing jury a misleading and inaccurate view of the role of appellate review of death sentences, thereby decreasing jurors' sense of personal responsibility for decision and rendering death sentence unreliable) with Romano v. Oklahoma, 512 U.S. 1, 9-10 (majority op.) & 14-15 (O'Connor, J., concurring) (1997) (no Eighth Amendment violation in informing capital sentencing jury of pre-existing death sentence where that evidence was **accurate** at the time it was admitted) and California v. Ramos, 463 U.S. 992, 1004 (1983) (capital sentencing instruction gave capital sentencing jury **accurate** information about governor's power to commute a life sentence; hence, there was no diminution of the reliability of the sentencing decision required by the Eighth Amendment). And, taking their cue from these decisions, lower courts have similarly condemned under the Eighth Amendment capital sentencing instructions which give the sentencing jury an **inaccurate** view of their sentencing alternatives. See, e.g., Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997); Hamilton v. Vasquez, 17 F.3d 1149, 1159-64 (9th Cir. 1994).

The Fifth Circuit's decision in this case is inconsistent with this Court's unflagging insistence on **accurate** information during capital sentencings and with decisions of other lower courts which have correctly applied the Court's jurisprudence. The erroneous injection of a nonexistent "lesser sentence" alternative in this case -- and the erroneous suggestion that such a sentence would result

from jury nonunanimity -- rendered Petitioner's death sentence unreliable and hence in violation of the Eighth Amendment.[18] Moreover (but relatedly), these errors also violated due process under the doctrine of Hicks v. Oklahoma, since the sentencing jury was not correctly apprised of its sentencing alternatives.

Because of the importance of the Eighth Amendment and due process issues raised herein, and because of the tension between the Fifth Circuit's decision in this case and decisions both of this Court and of lower courts, this Court should grant certiorari to consider the Fifth Circuit's decision in this case.

III. Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?

The jury that sentenced Petitioner relied upon unconstitutional nonstatutory aggravating factors in the weighing process that led to the sentence of death. The nonstatutory aggravating factors that were submitted to, and found by, the jury violated the Eighth Amendment and the Due Process Clause of the Fifth Amendment. The District Court erred in submitting those two factors

[18] These inaccuracies created all of the same problems -- discussed in detail in the preceding argument -- as the district court's refusal affirmatively to inform the sentencing jury that jury nonunanimity would result in a sentence of life without release or parole imposed by the judge, pursuant to 18 U.S.C. § 3594. Indeed, these are two sides of the same coin. In the first question presented, Petitioner complains of the withholding of correct information from the jury; in the second question presented, Petitioner complains of the giving of **incorrect** information to the jury. But whether the sin is one of omission or commission, the result is the same: the jury had inaccurate information, and hence rendered a sentencing verdict which is not reliable, as required by the Eighth Amendment.

to the jury. Indeed, the Court of Appeals held without hesitation that these two nonstatutory aggravating factors were unconstitutionally vague, overbroad, and duplicative. Jones, 132 F.3d at 250-51.

The Court of Appeals, however, did not reverse and remand for a new sentencing hearing. Instead, the Court of Appeals purported to "cure" this constitutional error by applying the doctrine of harmless error. Id. at 251-52. In so doing, however, the Fifth Circuit misapplied this Court's precedents. Those precedents are clear and well settled. Because a capital defendant is entitled under the Eighth Amendment to an individualized determination of his sentence, an appellate court in a weighing jurisdiction cannot rely upon the fact that there remain valid aggravating factors in order to automatically affirm a death sentence. Rather, "when the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the ... appellate court ... must actually perform a new sentencing calculus, if the sentence is to stand." Richmond v. Lewis, 506 U.S. 40, 49 (1992).

Moreover, a "bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion," Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring), because the Eighth Amendment requires "a detailed explanation based on the record" to support a finding of harmless error. Clemons v. Mississippi, 494 U.S. 738, 753 (1990). The Fifth Circuit's conclusion is precisely such a bald assertion, lacking any explanation of the actual reweighing performed by the court. In addition, the only explanation the court did give as to its reasoning indicates that the court applied an "automatic affirmance" rule based upon two valid aggravating factors.

This Court should grant certiorari to correct such an obvious and blatant disregard of its precedents. More important, however, than the opportunity to correct an obvious error in one case

is the fact that this is the first case in the nation tried and appealed under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.). The Fifth Circuit's opinion in this case will doubtless be cited and relied upon in the many subsequent cases that have been and will be tried under this statute. This Court sits not only as a court of constitutional error, but also as the supervisor of the lower federal courts. Accordingly, this Court should not let stand such a blatant misapplication of its precedents on the proper application of harmless error.

This case also presents the opportunity to resolve the question left open by this Court in prior cases as to "the degree of clarity with which [an] appellate court must reweigh in order to cure an otherwise invalid death sentence." Richmond v. Lewis, 506 U.S. at 48. Additionally, this case squarely presents the issue, implicit in many previous holdings, as to whether the bald assertion of "harmless error" in the absence of "any principled explanation of how the court reached that conclusion" satisfies the requirement of individualized sentencing. See Sochor v. Florida, 504 U.S. at 541 (O'Connor, J., concurring).

A. The Jury Relied upon Unconstitutionally Vague, Overbroad, and Duplicative Aggravating Factors in the Weighing Process that led to the Sentence of Death.

The Eighth Amendment principles relevant to this case are well settled. The Federal Death Penalty Act of 1994 is a "weighing" statute. Under such a capital sentencing scheme, the sentencer must balance each aggravating factor proven and found to exist against each mitigating factor proven and found to exist. The jury is instructed that it may sentence the defendant to death only if all the aggravating factors found to exist outweigh all the mitigating factors.

If a statute uses aggravating factors to determine who shall be eligible for the death penalty or who shall actually be sentenced to death, the factors cannot be "of vague or imprecise content"

such that they fail to channel the sentencer's discretion. Stringer v. Black, 503 U.S. 222, 237 (1992). "[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty," Richmond v. Lewis, 506 U.S. 40, 46 (1992) (citations omitted), and "fails adequately to inform juries what they must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). "An aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). Additionally, if the sentencer "could fairly conclude that an aggravating circumstance applies to **every** defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993) (emphasis in original).

In this case, the two nonstatutory aggravating factors found by the jury were:

> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

Essentially, the jury was asked to "find" the victim's "personal characteristics" and her "background", and to weigh those purported aggravating factors in the balance. Those factors were not "aggravating," as required by the Eighth Amendment, because they do not separate this homicide from the many other homicides in which the death penalty is not imposed. Nor did they guide or channel the jury's discretion in the weighing process the jury was required to perform to determine the sentence. Even worse, these vague and overbroad factors were impermissibly weighed **twice** in the decisional process. The Eighth Amendment does not allow the sentencer to consider overlapping and duplicative aggravating factors, because weighing the same factor twice in the sentencing calculus necessarily skews the balance toward death's side of the scale.

Aggravating factors play a critical role in a weighing scheme like the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.) In addition to narrowing the class of defendants eligible for the death penalty, aggravating factors in weighing jurisdictions are crucial in guiding the jury's decision on whether to impose the death penalty. Stringer v. Black, 503 U.S. 222, 234 (1992). Under a weighing statute, the jury may only consider those statutory and nonstatutory aggravating factors for which notice has been provided to the defendant; no other information may be brought to bear in the sentencing determination.

Because of the critical role played by aggravating factors in a weighing statute, such a statute may not use factors that fail to guide the sentencer's discretion. A vague or imprecise aggravating factor "creates [a] risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 235. A death sentence imposed under a weighing statute that was based in part on an invalid aggravating factor may not be affirmed automatically. "An automatic rule of affirmance in a weighing state would be invalid . . . for it would not give defendants the individualized treatment that would result from the actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons v. Mississippi, 494 U.S. 738, 752 (1990). In sum, the use of an invalid aggravating factor in the weighing process "creates the possibility not only of randomness but also of bias in favor of the death penalty," because the side of the scale tipping in favor of death is made heavier by the weight of each aggravating factor found by the jury. Stringer v. Black, 503 U.S. at 236.

B. The Court of Appeals Did Not Cure This Constitutional Error

Where, as here, a sentencer relies upon an unconstitutional aggravating factor or factors, the sentence itself is unconstitutional and must be reversed, unless the reviewing court corrects the

constitutional error. This may be accomplished either by the appellate court's reweighing of the valid aggravating factors against the mitigating evidence (ignoring the invalid aggravating factors), or by the appellate court's application of harmless error analysis. Clemons v. Mississippi, 494 U.S. 738, 741 (1990). It is not sufficient merely to recite the formula for harmless error. Rather, because the Eighth Amendment entitles the defendant to individualized treatment, the appellate court must "actually perform a new sentencing calculus." Richmond v. Lewis, 506 U.S. 40, 49 (1992). That new sentencing calculus necessarily requires the appellate court to perform a reweighing of the mix of mitigating and aggravating factors.

The Court of Appeals in this case purported to apply harmless error analysis. However, the court neither "made a detailed explanation based upon the record," Clemons, 494 U.S. at 753, nor offered "a principled explanation for how the court reached that conclusion." Sochor, 504 U.S. at 541 (O'Connor, J., concurring). At a minimum, such a new sentencing calculus requires a detailed explanation of how it engaged in the reweighing and of how much weight it assigned to each aggravating and mitigating factor. Several state supreme courts, particularly since this Court's decision in Clemons, have experience in this kind of analysis. For example, the Tennessee Supreme Court has held:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravating factor, and the nature, quality and strength of mitigating evidence.

State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994).

The Fifth Circuit's explanation fell far short of this standard. Indeed, in the one paragraph in which it discussed whether the error was harmless, the court emphasized that the two statutory

aggravating factors found by the jury were valid. The court appeared to hold that because there were two valid aggravating factors, the sentence itself was necessarily valid. The court stated:

> [I]f the jury had failed to find at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore the ability of the jury to recommend the death penalty hinged on a finding of at least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty.

United States v. Jones, 132 F.3d 232, 252 (5th Cir. 1998).

This is remarkably similar to Clemons, where the opinion of the Mississippi Supreme Court was ambiguous as to whether the court had actually reweighed. Some language of the court's opinion seemed to indicate that the court had engaged in proper appellate reweighing. Other language, however, indicated that the court had affirmed solely because there remained one valid aggravating factor to support the death penalty verdict. This Court held that although the Mississippi court's opinion did not necessarily indicate that no reweighing was undertaken, "the court's statement can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. If that is what the Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept." Clemons, 494 U.S. at 751-52.

It is true that the Court of Appeals used the phrase "harmless error," and the court stated that the death sentence would have been imposed "had the invalid aggravating factors never been submitted to the jury." However, the court did not actually perform a new sentencing calculus. The most obvious indication is the court's failure to even mention the mitigating factors proved by the defendant and found by one or more jurors. A new sentencing calculus would have required the court to weigh the two remaining aggravating factors against the mitigating factors. Indeed, the court

did not discuss the mitigating evidence at all--other than a bare reference to "the eleven mitigating factors found by one or more jurors." This Court held in Clemons that:

> because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of the defendant's mitigating evidence.

Clemons, 494 U.S. at 752.

This case is quite similar, except that the Fifth Circuit's opinion is not "virtually silent" with respect to the particulars of the mitigating evidence; the opinion is **completely silent** with respect to the particulars of Petitioner's mitigating evidence.

In point of fact, there was an extraordinary amount of mitigating evidence in this case -- as powerful and compelling a case in mitigation as the courts ever see in a capital case.[19] Petitioner served his country honorably and courageously for twenty-two years in the United States Army, retiring with an honorable discharge as a Master Sergeant in the Army Airborne Rangers. He served with distinction in two foreign wars, and was awarded a Meritorious Service Award and a Commendation Medal. Unlike the typical capital defendant, Petitioner had no criminal record. Moreover, Petitioner had overcome a horrible and traumatic childhood, which included regular sexual and physical abuse, and against overwhelming odds he managed to lead a successful and productive adult life. Finally, the defense offered compelling expert testimony of brain damage and psychiatric and psychological disorders, which were unleashed by the emotional trauma of

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[19] Cf. State v. Howell, 868 S.W.2d 238, 262 (Tenn. 1993) (in conducting harmless error analysis, emphasizing that there was no mitigating evidence of defendant's good character), cert. denied, 510 U.S. 1215 (1994).

Petitioner's final break with his ex-wife Sandy, and which combined to severely impair Petitioner's ability to control his impulses on the night of the murder.[20]

Petitioner was entitled under the Eighth Amendment to have this mitigating evidence considered in the weighing process that led to his sentence. Because the Court of Appeals mentioned none of this evidence in its summary conclusion that the evidence was harmless, the Court of Appeals did not perform the type of "new sentencing calculus" required by the Eighth Amendment.

C. The Record Does Not Support a Finding That the Sentence Would Have Been the Same Absent the Two Unconstitutional Aggravating Factors

The failure of the Court of Appeals to articulate the basis of its conclusion that the error was harmless requires reversal. The sentence of death cannot be affirmed absent a real and principled weighing of the remaining valid aggravating factors against all the mitigating factors.

Moreover, the problem is more than one of insufficient articulation by the Court of Appeals. Had the Court of Appeals actually conducted a new sentencing calculus, the record in this case simply could not support a finding beyond a reasonable doubt that a properly instructed jury, not relying upon the two invalid aggravating factors, would have reached the same decision. Several facts reveal that this was a close and difficult decision for the jurors. First, the jury's findings as to the aggravating factors submitted by the government indicate that the jury's decision was anything but a foregone conclusion. The jury refused to find that Petitioner committed the offense after substantial planning and premeditation (Aggravating Factor 2(D)); it refused to find that he knowingly created a grave risk of death to one or more persons in addition to the victim

[20] The importance of Sandy Lane in triggering the tragic chain of events in this case can hardly be understated. Indeed, as previously noted, seven jurors "wrote in" Sandy as a mitigating circumstance in this case. And, as also noted, Tracie McBride bore a strong physical resemblance to Sandy Lane.

(Aggravating Factor 2(B)); and the jury refused to find that Petitioner constitutes a future danger to the lives and safety of other persons (Aggravating Factor 3(A)).

Even with the two invalid aggravating factors weighed in the balance, the decision was difficult and close. The jury deliberated for a day and a half. The affidavits included in Appendices H and I provide a window into how difficult and close the decision was. And, as shown above, and as found by the Fifth Circuit, the jury was instructed erroneously that there was a lesser sentence than death or life imprisonment available. This error further skewed the deliberations, and makes it especially difficult to rely upon the jury's actual verdict to speculate whether a properly instructed jury would have reached the same decision.

Thus, on this record, it is simply not possible to conclude beyond a reasonable doubt that the jury would have sentenced the defendant to death without the submission of the two invalid aggravating factors. Accordingly, the proper remedy on this record is not to remand to the Court of Appeals to conduct a proper harmless error analysis. Instead, the case should be remanded for a new sentencing hearing before a jury.

D. The Fact That the Two Invalid Aggravating Factors Were "Nonstatutory" Does Not Render Them Any Less Harmful

The Court of Appeals seemed to assume that because the invalid aggravating factors were nonstatutory, those factors could not play a large role in the jury's deliberations. Contrary to the court's implication, nonstatutory aggravating factors can have a profound impact in a federal capital case, because they are weighed alongside statutory aggravating factors in the decision between life and death. Petitioner's jury was instructed that it **must** weigh each aggravating factor that it found in the weighing process. In this weighing process, jurors may choose to assign greater weight to a

nonstatutory aggravating factor than to any or all of the remaining statutory aggravating factors and mitigating factors in the case.

The basis for nonstatutory aggravating factors is in 18 U.S.C. § 3593(c). After listing several "statutory" aggravating factors, the statute provides: "The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists." The invalid aggravating factors in this case were "nonstatutory;" that is, they do not appear in the list of aggravating factors in 3593(c); they were drafted by the prosecutor pursuant to the purported authority of the sentence quoted above. That statute provides no guidance to the prosecutor for the formulation of nonstatutory aggravating factors.

Whatever the constitutionality of such a delegation of power to the prosecutor, the facts of this case starkly reveal how such power can be abused. Unlimited authority in the prosecutor to draft aggravating factors for particular cases can lead to arbitrary and unreliable capital sentencing. If the power to draft vague and duplicative aggravating factors is not limited, there is nothing to stop a prosecutor from outlining a closing argument, and then turning the topic sentence of each paragraph of the argument into a separate aggravating factor to be "found" by the jury. The jury would then be told that it must weigh each of those purported aggravating factors in its deliberations.

The fact that the two invalid aggravating factors in this case were duplicative and overlapping makes harmless error analysis especially inappropriate. Not only was an invalid aggravating factor weighed in the balance, as in Sochor, Clemons, Richmond, Stringer, and other cases, the invalid factor was weighed **twice** in this case. The Constitution does not allow the prosecutor to skew the weighing process in this manner.

The Court of Appeals correctly held that the nonstatutory factors drafted by the prosecutor in this case were unconstitutionally vague, overbroad, and duplicative, and that the jury's reliance

upon these factors constituted constitutional error. Unfortunately, the Court of Appeals mistakenly assumed, without any basis, that the nonstatutory aggravating factors were not significant in the jury's deliberations. That conclusion was erroneous. Because the Federal Death Penalty Act of 1994 gives authority to prosecutors to draft nonstatutory aggravating factors to fit the facts of particular cases, nonstatutory aggravating factors will play a large role in prosecutions in death penalty cases in federal court. This Court should, in its supervisory power over lower federal courts, find this constitutional error harmful and reverse the judgment of the Court of Appeals.

For all of these reasons, this Court should grant certiorari to consider this question presented, along with any other questions fairly presented thereby.

IV. Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?

SUBSIDIARY QUESTION: Under § 3595, must each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals?

The foregoing issues are important ones which certainly merit this Court's exercise of its certiorari power. However, this Court may wish to pretermit consideration of these issues at this time, in light of a procedural flaw with the opinion and judgment below -- namely, the Fifth Circuit's failure to comply with 18 U.S.C. § 3593(c)(1) and (c)(3).

The Federal Death Penalty Act of 1994 (FDPA) (codified at 18 U.S.C. §§ 3591-3598, see Appendix C), lays down strict requirements for appellate review of death sentences handed down under that Act. See 18 U.S.C. § 3595. Of particular interest in this case, § 3595 mandates that "[t]he court of appeals **shall** address **all** substantive and procedural issues raised on the appeal of a sentence of death . . . .," 18 U.S.C. § 3595(c)(1); and further mandates that "[t]he court of appeals **shall** state in writing the reasons for its disposition of an appeal of a sentence of death under this section." 18 U.S.C. § 3595(c)(3).

In this case, Petitioner filed an appellate brief with 18 issues, many of which had various subparts. Nevertheless, the Court of Appeals in its written opinion specifically addressed only four of these issues. The Court of Appeals did state that it had "consider[ed] all the issues raised by the defendant on appeal." Jones, 132 F.3d at 237; see also id. at 252 (court referenced the fact that it had "consider[ed] the eighteen issues raised by the appellant on appeal"). However, except for Issues I, III, IV, and V, the Court of Appeals did not specifically address or discuss these issues in its written opinion.

Petitioner filed a petition for rehearing by the panel, arguing, among other things, that the opinion of the Court of Appeals did not comport with the requirements of 18 U.S.C. § 3595(c)(1) and (c)(3). However, the Court of Appeals summarily denied rehearing. See Appendix B.

It is clear that, under 18 U.S.C. § 3595(c)(1) and (3), a reviewing court of appeals must not only (1) address every issue raised by a person sentenced to death under the FDPA; but must also (2) state its reasons for deciding any such issue or issues in writing. It also seems clear that at least part of the reason for the "full opinion" requirement of § 3595(c)(1) and (c)(3) was to facilitate this Court's review of death sentences imposed under the FDPA -- a review which is doubly important

because this Court is sitting not only as a court of constitutional error, but also as the supervisor of the lower federal courts.

In this regard, it is appropriate to notice the important role which this Court has assigned to appellate review in upholding the constitutionality of death penalty schemes. See, e.g. Gregg v. Georgia, 428 U.S. 153, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."); Parker v. Dugger, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."). Indeed, the United States District Court for the Southern District of New York has only very recently relied on the "full opinion" requirements of § 3593(c)(1) and (c)(3) to find that the FDPA provides the type of "meaningful appellate review" found "crucial" in Gregg and Parker. See United States v. Frank, ____ F.Supp. ____, 1998 U.S. Dist. LEXIS 6369 ** 56-57 (S.D.N.Y. May 6, 1998).

And this Court has itself noted that its own "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). That duty is frustrated by summary denials of claims by the Court of Appeals, which leave the basis for that court's decision shrouded in mystery.

In sum, by enacting 18 U.S.C. § 3595(c)(1) and (3), Congress decreed that a reviewing court of appeals must not only (1) address every issue raised by a person sentenced to death under the FDPA; but must also (2) state its reasons for deciding any such issue or issues in writing. These requirements were not met in this case.

Furthermore, as a practical matter, only this Court can interpret and enforce the requirements of § 3595, because this Court is the only Court above the federal courts of appeals to whom these

requirements are directed. The proper interpretation and enforcement of § 3595 is essential to the proper functioning of the FDPA and the administration of justice generally. Therefore, this Court should grant certiorari in this case; and thereafter should vacate the present opinion and judgment of the Fifth Circuit and remand with instructions (1) to write an opinion addressing all of Petitioner's issues, in compliance with 18 U.S.C. § 3595(c)(1) and (c)(3); and (2) to enter judgment in conformity therewith.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

4. Whether the court of appeals complied with statutory requirements to "address" all of petitioner's claims and to "state in writing" the reasons for its disposition of the appeal.

STATEMENT

After a jury trial in the Northern District of Texas, petitioner was convicted of the capital offense of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1201, and of the non-capital offense of assaulting a different victim, in violation of 18 U.S.C. 113. After a separate sentencing hearing, the jury recommended that petitioner be sentenced to death for the capital offense. Pet. App. A8. The district court sentenced petitioner to death on the capital count and to 57 months' imprisonment on the non-capital count. Pet. 3. The court of appeals affirmed. Pet. App. A1-A25.

1. The trial evidence showed that petitioner kidnapped and brutally killed Tracie Joy McBride, a 19-year old private who was stationed at Goodfellow Air Force Base in San Angelo, Texas. On February 18, 1995, petitioner abducted McBride from the base at gunpoint. In the process, petitioner assaulted and severely injured Private Michael Peacock. On March 1, 1995, petitioner was arrested for a separate crime: the abduction and sexual assault of his ex-wife Sandra Lane, which had occurred two days before the McBride kidnapping. Petitioner, who by then was considered a possible suspect in the McBride case, waived his Miranda rights and confessed that he kidnapped and murdered McBride. Pet. App. A6.

In his written statement, petitioner admitted that he abducted McBride and brought her back to his apartment, where he tied her up and put her in the closet. Petitioner also admitted that he drove McBride to a remote location, where he repeatedly struck her over

the head with a tire iron until she died. Petitioner was unable to describe the location but he led investigators to a bridge, located 20 miles outside San Angelo, Texas, under which they found McBride's dead body. An autopsy revealed that she had died from blunt force trauma to the head and that she had been assaulted sexually. Pet. App. A6-A7.

2. A special jury sentencing hearing was held, pursuant to 18 U.S.C. 3593, on the capital count. The jury, as required by statute, considered: (1) whether petitioner intended to kill McBride or acted with some other degree of scienter sufficient to support the death penalty, see 18 U.S.C. 3591(a); (2) whether the prosecution proved beyond a reasonable doubt the statutory aggravating factors and non-statutory aggravating factors that it had alleged, 18 U.S.C. 3593(c); (3) whether the defense proved any mitigating factors by a preponderance of the evidence, ibid.; and 4) whether the aggravating factors "sufficiently outweigh[ed]" any mitigating factors in order to justify a sentence of death, 18 U.S.C. 3593(e). Pet. App. A7-A8.

The jury found, beyond a reasonable doubt, that petitioner intentionally killed McBride and also that he intentionally inflicted serious bodily injury that resulted in her death. Pet. App. A7. The jury next found beyond a reasonable doubt two of the four statutory aggravating factors alleged by the prosection: that petitioner caused the death during commission of kidnapping, another crime, and that petitioner committed the offense in an especially heinous, cruel, and depraved manner. See 18 U.S.C.

3592(c)(1) & (6); Pet. App. A8. The jury also found beyond a reasonable doubt two of the three non-statutory aggravating factors: McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and McBride's "personal characteristics and the effect of the offense on her family." The jurors individually decided whether any mitigating factors, including the 11 factors proposed by the defense, existed. One or more jurors found the existence of ten of the 11 proposed factors, and seven jurors found the existence of an additional mitigating factor. Finally, the jury weighed the aggravating factors against the mitigating factors. Pet. App. A8.

After making the findings required by statute, the jury unanimously recommended that petitioner be sentenced to death. Pet. App. A8. The district court followed that recommendation and imposed a death sentence on the capital count. See 18 U.S.C. 3594.

3. The court of appeals affirmed. Pet. App. A1-A25. The court upheld the constitutionality of the Federal Death Penalty Act, 18 U.S.C. 3591-3598, and, in so doing, rejected several arguments that petitioner does not renew before this Court. See id. at A8-A12.

a. The court of appeals next rejected several challenges by petitioner to the jury instructions. First, the appeals court rejected petitioner's contention that the trial court erred by not instructing the jury that its failure to reach a unanimous recommendation on the death penalty would result in the court automatically imposing a life sentence without possibility of

release. See Pet. App. A13 & n.8. The court of appeals explained that the instructions proposed by petitioner were legally incorrect: "Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered." Id. at A13.

The court distinguished a Louisiana Supreme Court decision holding that juries must be informed of the consequences of deadlock, because, unlike the federal death penalty provisions, "the Louisiana death penalty act * * * expressly provided that life imprisonment resulted when the jury could not unanimously agree on the death penalty." Id. at A16 (citing State v. Williams, 392 So.2d 619 (La. 1980)). The court explained that, in contrast to the Louisiana rule, "federal courts have never been affirmatively required to give such instructions." Ibid. The court therefore held that "no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict." Ibid.

b. The court also declined to reverse petitioner's sentence based on his challenges to instructions, to which he did not object in the trial court, that suggested that there was a possibility that the court could impose a sentence less severe than life imprisonment. Pet. App. A13-A17. The court rejected petitioner's argument that the instructions could lead a reasonable juror to believe that the court would automatically have imposed a sentence of less than life imprisonment in the event of jury deadlock:

> Reading the instructions in their entirety, the court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement [each time the court mentioned the lesser sentence option in the instructions].

Pet. App. A15.

The court also rejected petitioner's argument that "the disparity of the verdict forms," which had to be signed by all 12 jurors in the event of a death or life imprisonment recommendation but only by the foreperson in the event of a lesser recommendation, amounted to plain error. Pet. App. A15. The court explained that, "[a]lthough the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." Ibid. Finally, the court rejected, as precluded by Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits in an attempt to show that jurors in fact were confused by the instructions. Pet. App. A16-A17.

The court also rejected petitioner's related claim that the trial court committed plain error by allowing the jury three options -- death, life imprisonment without release, and some other lesser sentence. Pet. App. A17-A19. After examining "the disparate sentencing options provided for" in the Federal Death Penalty Act, 18 U.S.C. 3593(e), which provides all three possibilities, and the Federal Kidnapping statute, which provides

only for death or life imprisonment, the court concluded that "the substantive criminal statute [i.e., the kidnapping statute] takes precedence over the death penalty sentencing provisions." Pet. App. A19. The court also found, given that parole and early good time release for life offenders have been abolished in the federal system, "no meaningful distinction exists between 'life' [as mandated by the kidnapping statute] and 'life without the possibility of release.'" Ibid. Although the court held that "the district court committed error by informing the jury of the lesser sentence option available under § 3593," the court declined to find that the mistake constituted plain error that would require reversal even in the absence of a timely objection. Ibid.

The court next rejected petitioner's challenges to the two statutory aggravating factors found by the jury -- that petitioner caused the death during commission of kidnapping, another crime, and that petitioner committed the offense in an especially heinous, cruel and depraved manner that involved torture and serious physical abuse. Pet. App. A19-A22. In contrast, the court held that the two non-statutory aggravating factors found by the jury -- the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and her "personal characteristics and the effect of the offense on her family" -- were invalid, both because they were "duplicative" of each other and because they were "vague and overbroad." Id. at A22-A23.

Although the court held that the non-statutory aggravating factors found by the jury were not valid, the court concluded that

the jury's consideration of those factors was harmless beyond a reasonable doubt. Pet. App. A23-A25. The court explained that, "[u]nder a weighing statute [such as the Federal Death Penalty Act], affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." Id. at A23-A24. After detailing the possible methods of appellate analysis, the court decided to "redact the invalid aggravating factors" (id. at A25) and "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors" (id. at A24). The court found that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury," whereas "jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty." Id. at A25. The court concluded that the erroneous non-statutory aggravating factors were "harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." Ibid.

ARGUMENT

The court of appeals correctly affirmed petitioner's death sentence in an opinion that creates no conflict with any other decision. None of the four questions and various "subsidiary

questions" (Pet. i-ii) presented by the petition warrants this Court's review.

1. Petitioner claims (Pet. 10-17) that the district court was legally required to instruct the jury that the jury's failure to agree on a unanimous sentencing recommendation would require the court to impose a sentence of life imprisonment without possibility of release. Petitioner also requested an instruction that, if any juror was not persuaded that death was the appropriate sentence, the jury "must return a decision against capital punishment and must fix [petitioner's] punishment at life in prison without the possibility of release." Pet. App. A13 n.8. The court of appeals correctly explained, however, that the instructions proposed by petitioner did not accurately state the law and, in any event, were not required. Id. at A12-A13, A16.

a. Petitioner's proposed instructions were legally erroneous, because the Federal Death Penalty Act requires jury unanimity for any sentencing recommendation. See 18 U.S.C. 3593(e) ("jury by unanimous vote * * * shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or [to] some other lesser sentence"). By the plain terms of the statute, therefore, there can be no jury sentencing decision without unanimous agreement. The legal theory underlying petitioner's proposed instructions -- that "Unanimity [is] Required Only for [a] Death Sentence [Recommendation]" (Pet. App. A13 n.8) -- thus contravenes the plain statutory language.

Petitioner's contention that there can be no retrial following a hung jury is also not supported by the statutory language. To the contrary, the statute suggests that a jury that deadlocks on the sentencing recommendation should be dismissed and a new jury impaneled to recommend the sentence. Section 3593(b)(1) of Title 18 of the United States Code provides that the penalty phase hearing ordinarily should be conducted "before the jury that determined the defendant's guilt," but 18 U.S.C. 3593(b)(2) permits the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause." The phrase "discharged for good cause," read naturally, encompasses the discharge of the guilt phase jury because it has been unable to agree on a unanimous sentencing decision.

The statute's failure to authorize in express language resentencing following a hung jury is not surprising. Although no federal statute or procedural rule expressly allows retrial following a hung jury on a substantive criminal charge, it has long been the rule that the government is entitled to retry a case to a new jury if the first jury is discharged based on its inability to reach a verdict. See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). See also Richardson v. United States, 468 U.S. 317, 325 (1984) ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments").

Contrary to petitioner's argument (Pet. 13), his interpretation is not compelled by the second sentence of 18 U.S.C. 3594. That Section provides:

> Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. 3594 (emphasis added). Read in the context of the preceding sentence and the statute as a whole, the underlined sentence means that, if the jury, in accordance with Section 3593(e), unanimously recommends "some other lesser sentence," 18 U.S.C. 3593(e), rather than death or life in prison, the court may impose "any lesser sentence that is authorized by law," 18 U.S.C. 3594. In other words, if the jury unanimously recommends death or life in prison, the judge must impose the recommended sentence. If the jury unanimously recommends less severe punishment, the court, not the jury, fixes the actual terms of that punishment.

Petitioner contends that the underlined sentence serves an additional purpose, beyond providing that the court (rather than the jury) shall fix the actual term of imprisonment in cases when the jury recommends punishment less severe than life in prison. In his view, the sentence also creates an unstated rule that jury deadlock requires imposition of the least severe punishment option. Petitioner's reading of the sentence is incorrect, not simply because it overlooks the background rule that retrial is generally

permitted following a hung jury, but more importantly because it fails to take account of the remainder of the statute. See Gustafson v. Alloyd Co., 513 U.S. 561, 569-570 (1995) (statute must be read as a whole).

Petitioner's default sentencing rule would nullify the requirement in Section 3593(e) that the jury unanimously recommend the sentence even if the sentence is for imprisonment for a term of years less than life. And petitioner's rule runs counter to Section 3593(b)(2)(C), which allows sentencing by a specially empaneled jury when "the jury that determined the defendant's guilt was discharged for good cause." See Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997) (court should not interpret statute in a way that would "emasculate an entire section"); Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 698 (1995) (noting "reluctance to treat statutory terms as surplusage").

Petitioner's claim (Pet. 13) that the statute's "clear language" justifies the jury instruction he seeks is further undermined by the Louisiana case upon which he relies. See Pet. 14 (citing State v. Williams, 392 So.2d 619 (La. 1980)). As this Court has noted, "Louisiana law provides that if the jury hangs, the court shall impose a sentence of life imprisonment." Lowenfield v. Phelps, 484 U.S. 231, 238 (1988). The Louisiana provision, however, contains "clear language" requiring that result: "If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life

imprisonment without benefit or probation, parole or suspension of sentence." La. Code Crim. Proc. art. 905.8 (West 1984). Comparable language is notably absent from the Federal Death Penalty Act.[2]

b. Even if petitioner were correct that the jury's failure to agree on a sentencing recommendation requires the court to enter the least severe sentence available under the law, petitioner would not have been entitled to an instruction to that effect. This Court has held that the Constitution precludes some instructions that "improperly describe[] the role assigned to the jury by local law." See Dugger v. Adams, 489 U.S. 401, 407 (1989) (citing Caldwell v. Mississippi, 472 U.S. 320 (1985)). The Court, however, has never suggested that the Constitution requires that the jury be instructed on the consequences if it should fail to reach a

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[2] Petitioner argues (Pet. 13-14) that the decision of the court of appeals on the effect of jury deadlock conflicts with oral comments of the district court in United States v. Nichols, 1998 WL 2518 (D. Colo. Jan. 7, 1998). Conflict with a district court decision is not a ground for certiorari. See S. Ct. Rule 10(a). In any event, there is no conflict between the decision in petitioner's case and Nichols. The court in Nichols did not give the jury deadlock instructions requested by petitioner in this case, but, to the contrary, instructed that all 12 jurors would have to sign the verdict form whether the jury recommendation was death, life imprisonment, or some other lesser sentence. See 1998 WL 1057, at **36-42 (D. Colo. Jan. 5, 1998). Furthermore, the jury in Nichols did not deadlock on the question of the appropriate sentence. The jury never addressed that question, because it deadlocked on the anterior question whether the defendant had acted with the requisite intent to kill. The district court in Nichols did comment that the jury's deadlock on that issue was, in legal effect, "the jury's choice of the third [sentencing] option, which is sentencing by the Court." 1998 WL 2518, at *4. That comment does not conflict with the court of appeals' ruling in this case that petitioner was not entitled to the instructions he requested on the consequences of jury deadlock.

unanimous verdict. To the contrary, the Court has noted that, even when jury deadlock returns the matter to the judge for sentencing, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" Lowenfield, 484 U.S. at 238 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)). Petitioner's proposed instruction would undermine that strong interest by discouraging deliberations to achieve jury unanimity.

For that reason, the federal courts have rejected arguments that the Constitution requires a jury instruction on the consequences of jury deadlock, even when the governing statute prescribes that deadlock shall result in judicial sentencing. See, e.g., United States v. Chandler, 996 F.2d 1073, 1088-1089 (11th Cir. 1993) (Title 21 federal death penalty case), cert. denied, 512 U.S. 1227 (1994); Evans v. Thompson, 881 F.2d 117, 123-124 (4th Cir. 1989) (habeas case), cert. denied, 497 U.S. 1010 (1990).[3]

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[3] Petitioner correctly notes (Pet. 15-16) that some state courts have held or suggested that the jury in a capital case should be informed when its failure to achieve unanimity will result in a court-imposed sentence other than death. Some of those cases turn on rules of state practice and do not purport to articulate a rule of federal constitutional law. See Turner v. Calderon, 970 F. Supp. 781, 796-797 (E.D. Cal. 1997). To the extent that others rest on interpretations of the federal Constitution, see, e.g., State v. Williams, 392 So.2d 619 (La. 1980), they do not conflict with the decision of the court of appeals in this case, which, as petitioner acknowledges (Pet. 14), turned on the court's conclusion that a failure to achieve unanimity would result in a second jury sentencing proceeding rather than a court-imposed sentence. See Pet. App. A13; see also id. at A16 (distinguishing Williams on that basis).

2. a. Petitioner next raises the fact-bound claim (Pet. 17-25) that the jury instructions and verdict forms improperly led the jury to believe that jury deadlock on the penalty automatically would result in a court-imposed sentence less than life imprisonment. The court of appeals correctly rejected that contention, see Pet. App. A13-A15, which is unworthy of this Court's review in any event.

This Court, in death and non-death cases alike, applies the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Boyde v. California, 494 U.S. 370, 378 (1990) (internal quotation marks omitted). A defendant challenging ambiguous jury instructions on appeal must demonstrate "a reasonable likelihood that the jury has applied the challenged instruction[s]" in a legally erroneous and prejudicial way. Id. at 380. Petitioner's burden is even heavier here because he did not timely raise his objection in the district court. He therefore must show: "(1) 'error' (2) that is 'plain,' and (3) that 'affect[s] substantial rights'" and that "(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (quoting cases).

The court of appeals properly applied that standard to the facts of petitioner's case. As the court of appeals explained, nothing in the jury instructions stated that petitioner would receive a sentence less than life imprisonment in the event of jury

deadlock. See Pet. App. A15. To the contrary, the district court instructed, consistent with the statute, that jury unanimity was required for each of the three sentencing options. See Pet. App. A14 (quoting instruction that: "you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence").

Petitioner nonetheless claims that jurors were reasonably likely to misconstrue the instruction because the district court did not repeat the requirement that the jury's recommendation be unanimous each time that the court described the option of a sentence less severe than death or life imprisonment. Petitioner also argues that the verdict form for the lesser offense option required only the jury foreperson's signature rather than the signature of each juror. Acknowledging that, viewed in isolation, aspects of the instructions and the verdict forms might have raised some ambiguity, the court of appeals concluded, based on its "[r]eading [of] the instructions in their entirety," that there was no reasonable likelihood that the jury was confused about the consequences if it failed to make a unanimous recommendation. Pet. App. A15; see also ibid. ("any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction"). Petitioner offers no reason for this Court to review the fact-specific judgment of the court of appeals.

The court of appeals' reliance on the jury instructions as a whole to cure any ambiguity in the verdict forms comports with "the

almost invariable assumption of the law that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987), quoted and applied in Shannon v. United States, 512 U.S. 573, 585 (1994). Here, the court instructed the jury: "In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release." Pet. App. A15. The jury is presumed to have followed that instruction. Cf. Shannon, 512 U.S. at 585 (jury presumed to have followed instruction not to consider consequences of finding defendant not guilty by reason of insanity). The court of appeals correctly rejected petitioner's submission of juror affidavits to rebut that presumption. See Pet. App. A16-A17. And, although petitioner continues to rely on those affidavits in this Court (Pet. 22), he does not challenge the court of appeals' ruling that the affidavits may not be considered.

b. The court of appeals did hold that, in light of the federal kidnapping statute's limitation of possible penalties to death and life imprisonment, the trial court should not have offered the jury a third option of imposing "some other lesser sentence." See Pet. App. A19. Petitioner, however, did not object to the inclusion of the third option. The court's reference to it therefore does not support reversal of petitioner's sentence unless he can establish that it prejudiced him and that it seriously affected the fairness, integrity, or public reputation of the proceedings, thus warranting discretionary relief. See Johnson,

117 S. Ct. at 1549-1550. Petitioner cannot show that the jury's mere consideration of an additional sentencing option meets those tests.

This case bears no resemblance to Hicks v. Oklahoma, 447 U.S. 343 (1980), in which the jury's sentencing options were improperly constricted, rather than expanded. In Hicks, the jury erroneously was told that a 40-year prison sentence was mandatory when in fact the law actually allowed any sentence of at least ten years' imprisonment. Under those circumstances, this Court concluded that the defendant was prejudiced by the erroneous instruction, which prevented the jury's consideration of sentences of fewer than 40 years. See id. at 346. Here, in contrast to Hicks, petitioner cannot show any harm from the submission of an extra sentencing option that the jury chose not to recommend.

3. Petitioner next challenges (Pet. 25-36) the determination of the court of appeals, based on the particular facts of petitioner's case, that the jury's consideration of two invalid, non-statutory aggravating factors was harmless beyond a reasonable doubt. The court of appeals, however, properly applied harmless error analysis under this Court's precedents and the governing statute.

The court of appeals correctly recognized that the Constitution permits two options to an appellate court that has invalidated an aggravating factor found by a jury: The appellate court may itself "reweigh" the valid aggravating and mitigating factors, or it may conduct harmless error review. See Pet. App.

A23-A24 (discussing Clemons v. Mississippi, 494 U.S. 738 (1990), and Stringer v. Black, 503 U.S. 222 (1992)). The court also properly determined that harmless error analysis may be conducted in two ways -- either by "inquir[ing] into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor been properly defined in the jury instructions" or by "inquir[ing] into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor." Pet. App. A24 (citing Clemons and Fifth Circuit case law). The court chose the second form of harmless error review. Ibid. It concluded that "the error was harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." Pet. App. A25.

The application of harmless error review was not only sanctioned by this Court's precedents but was, in fact, required by federal statute. See 18 U.S.C. 3595(c) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.").

Petitioner, however, attacks the harmless error methodology employed by the court, claiming (Pet. 31) that the court "appeared to hold that because there were two valid aggravating factors [remaining], the sentence itself was necessarily valid." Contrary to petitioner's claim, the court explicitly recognized that a "rule

automatically affirming a death sentence in a weighing scheme as long as one aggravating factor remained would violate the requirement of individualized sentencing." Pet. App. A24 (citing Clemons).

Petitioner also errs in claiming (Pet. 30) that "the court neither 'made a detailed explanation based upon the record,' nor offered 'a principled explanation for how the court reached [its] conclusion.'" The court of appeals set forth its harmless error methodology in detail and then explained why, applying that methodology, it concluded beyond a reasonable doubt that the jury's consideration of the invalid aggravating factors was harmless. See Pet. App. A23-A25. The court correctly noted that the non-statutory aggravating factors (unlike the statutory factors) were not necessary for the jury to impose the death sentence and that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory factors found unanimously by the jury." Pet. App. A25. Contrary to petitioner's claim that the court "fail[ed] to even mention the mitigating factors" (Pet. 31), the court reached its holding "even after considering the eleven mitigating factors found by one or more jurors." Pet. App. A25; see also id. at A8 n.3 (listing all mitigating factors and the number of jurors who found each of them). Petitioner's case thus bears no resemblance to Clemons, 494 U.S. at 753 (court made a "cryptic," one sentence conclusion of harmless error), or Sochor v. Florida, 504 U.S. 527, 540 (1992) (court "did not explain or even 'declare

a belief that' th[e] error was harmless beyond a reasonable doubt").

Petitioner also makes a fact-bound challenge to the harmless error finding. That challenge lacks merit. As petitioner explains, one reason that the court of appeals concluded that consideration of the non-statutory factors was erroneous was that the court believed they "were duplicative and overlapping" and were thus "weighed twice" (Pet. 35 (emphasis in original)). The likelihood that flaw affected the verdict is remote at best because the jury was instructed that the weighing process "is not a mechanical" one and that the jury "should not simply count the number of aggravating and mitigating factors and reach a decision on which number is greater" but "should consider the weight and value of each factor." Pet. App. F15. Another reason for the court's conclusion that the non-statutory factors should not have been considered was that they were "vague and overbroad." Pet. 28; Pet. App. A23. The likelihood that flaw affected the verdict is also small. The factors reflected two proper sentencing considerations: the vulnerability of the victim and the impact of her death on her family. See Pet. App. A22-A23 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991), and Twilaepa v. California, 512 U.S. 967, 977 (1994)). One of those considerations, the victim's vulnerability, was encompassed by one of the valid statutory factors. See Pet. App. A22 n.12 (listing "helplessness of the victim" as one of the "[p]ertinent factors" in considering whether killing was especially heinous, cruel or depraved).

Petitioner does not contend that the unartfully drafted non-statutory factors allowed the admission of evidence that was not otherwise properly before the jury. More important, the court of appeals found that "the government placed great emphasis on the two statutory factors" at the sentencing hearing. There is therefore no basis for this Court to review the court of appeals' harmless error finding.

4. Petitioner finally claims (Pet. 36-39) that the court of appeals violated two "procedural" requirements imposed by the death penalty statute -- (1) that the court "address all substantive and procedural issues raised on the appeal of a sentence of death," 18 U.S.C. 3595(c)(1)), and (2) that it "state in writing the reasons for its disposition of an appeal of a sentence of death," 18 U.S.C. 3595(c)(3). Petitioner suggests (Pet. 37) that the court violated those requirements because he "filed an appellate brief with 18 issues, many of which had various subparts," but "the Court of Appeals in its written opinion specifically addressed only four issues."

The court of appeals "address[ed]" -- i.e., it considered and disposed of -- all of the issues raised by petitioner's appeal. See Pet. App. A6 ("After considering all the issues raised by the defendant on appeal, we affirm both the conviction and the sentence of death"); id. at A25 (affirming conviction and sentence "[a]fter considering the eighteen issues raised by [petitioner] on appeal"). The court also "state[d] in writing the reasons for its disposition of the appeal," 18 U.S.C. 3595(c)(3): The court concluded that

"the sentencing provisions of the Federal Death Penalty Act are constitutional and that [petitioner's] death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor." Pet. App. A25.

Petitioner's claim of a violation of the statute collapses two separate statutory requirements -- that the court (1) address all issues and (2) state in writing its reasons for disposing of the case -- and thereby posits a requirement that "each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals" (Pet. 36). The statute is not phrased in the language that petitioner uses, and it does not impose the requirement that he would impose.

The court of appeals thus provided petitioner the appellate review to which the statute entitled him. Even assuming there were some procedural violation, however, petitioner has not shown that it prejudiced him in a manner that warrants this Court's review. Petitioner asserts (Pet. 37) that a purpose of the purported "'full opinion' requirement of § 3595(c)(1) and (c)(3) was to facilitate this Court's review of death sentences." Each of the claims petitioner raises in this Court, however, was discussed and resolved in writing by the court of appeals. The only claims that petitioner argues were not disposed of by "full opinion" are claims that he has chosen not to renew here. A remand to the court of appeals requiring it to discuss those claims in writing would thus not advance the purpose for which petitioner would have this Court impose the requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JONES, LOUIS (CAPITAL CASE)
Petitioner

vs.

USA

No. 97-9361

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 31st day of July 1998.

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July 31, 1998

ORIGINAL

NO. 97-9361

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOUIS JONES, JR.,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION
(Capital Case)

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CAPITAL CASE

QUESTIONS PRESENTED

I. **Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?**

II. **Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?**

III. **Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?**

IV. **Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?**

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REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

Now comes petitioner Louis Jones, Jr. and, pursuant to Supreme Court Rule 15.6, hereby files the following Reply to the Brief of the United States in Opposition to Petitioner's Petition for Writ of Certiorari.

I. Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?

The detail in which the government has felt obligated to respond to Petitioner's arguments on the merits belies the government's claims that the questions presented by this case are not worthy of this Court's consideration. This is especially true of the first question presented, which presents, among other issues, the extremely important issue whether, under the Federal Death Penalty Act of 1994 ("FDPA"), a second sentencing hearing is permitted following jury deadlock on the appropriate sentencing verdict.

The government's argumen s in favor of permitting a second sentencing hearing after jury deadlock are without merit. First, relying on 18 U.S.C. § 3593(e), which provides that the jury's "recommendation" on sentencing m ust be unanimous[1], the government claims that "there can be no jury sentencing decision without unanimous agreement." Resp. Br. 9. But § 3593(e) is not in the least inconsistent with Petitioner's argument, which is that, under 18 U.S.C. §3594, jury deadlock or nonunanimity results in a default sentencing by the **judge**. Section 3593(e) states only that, in order for the jury to issue a binding recommendation on sentence, that recommendation must be

[1] Section 3593(e) provides in relevant part that "the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."

unanimous. However, § 3593(e) is utterly silent on the consequences of failure to achieve unanimity, and thus provides no support for the government's arguments.

The government next claims that a second sentencing hearing following jury deadlock is implicitly authorized by 18 U.S.C. § 3593(b)(2)(C), which allows a hearing to be conducted before a jury other than the jury that determined the defendant's guilt if "the jury that determined the defendant's guilt was discharged for good cause." Resp. Br. 10. While admitting that "the statute[] fail[s] to authorize in express language a resentencing following a hung jury," the government argues that, nevertheless, such a resentencing should be implied from the statute on the basis of "the rule that the government is entitled to retry a case to a new jury if the first jury is discharged based on its ability to reach a verdict." Ibid.

This argument is flawed in several respects. First, as discussed below, § 3594 provides a compelling argument that jury deadlock results in a default sentencing by the judge. At the very least, the rule of lenity would require that the FDPA **not** be construed so as to permit the government numerous opportunities to try to put a defendant to death. This is particularly so in light of a line of this Court's cases which the government does not discuss. In Bullington v. Missouri, 451 U.S. 430, 446 (1981), this Court found that the Double Jeopardy Clause barred imposition of a death sentence after reversal of a previous prosecution in which the defendant had been sentenced to life imprisonment. This Court noted "the embarrassment, expense and ordeal," as well as the "anxiety and insecurity," occasioned by multiple attempts to seek the death penalty. Id. at 445 (internal quotation marks and citations omitted). The Court then noted that "[t]he unacceptably high risk that the prosecution, with its superior resources, would wear down a defendant, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." Id. at 445-46 (internal quotation marks and

citations omitted). See also Monge v. California, ___ U.S. ___, 118 S.Ct. 2246 (1998) (reaffirming Bullington in capital sentencing context, and reiterating concerns raised in Bullington).

These considerations -- the ordeal and anxiety of being placed on trial for one's life, plus the repugnance of the spectacle of allowing the government to have multiple shots at trying to persuade a jury to impose a sentence of death -- counsel toward interpreting the FDPA as Petitioner suggests. Under this interpretation, which is supported by the language of § 3594 and the policies underlying Bullington and its progeny, the government has one chance to persuade the jury unanimously to select death. If the government fails to do so, it is the government, and not the defendant, who bears the brunt of this failure.

Last, but certainly not least, the government attempts to discount the significance of 18 U.S.C. § 3594, which provides that a unanimous jury recommendation for death or life without release must be imposed by the judge; "[o]therwise, the court shall impose any lesser sentence that is authorized by law." The government claims that this latter sentence extends only to the possibility of a unanimous jury recommendation of a lesser sentence. Resp. Br. 11. But the government's interpretation does violence to the plain meaning of the word "otherwise." The plain meaning of the word "otherwise" is "**in every other case besides those specifically enumerated**." The government has shown no reason that would justify overriding the plain meaning of the word "otherwise."

If Congress had intended for the statute to read as the government argues, Congress could easily have made the second sentence to read parallel with the first sentence, as follows:

> ~~Otherwise,~~ *Upon a recommendation under section 3593(e) that the defendant should be sentenced to some other lesser sentence,* the court shall impose any lesser sentence that is authorized by law.

(Strikeouts indicate deletions; italics indicate proposed amendments.) But Congress did not do so, and that failure is telling.

While Petitioner does not purport, in the limited space available here, to give an exhaustive defense of his position on the merits, he has at least made a substantial showing of support for his position. And, "[e]ven if the [Court] does not consider the issue to be as clear as [Petitioner] do[es], [it] must at least acknowledge . . . that it is eminently debatable -- and that is enough, under the rule of lenity, to require finding for the petitioner here." Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). Thus, it is clear that this question presents a substantial and important subsidiary statutory question concerning capital prosecution under the FDPA, which this Court, in its role as superintendent of the lower federal courts, should examine in this capital case.

The constitutional question presented (if Petitioner's statutory interpretation is accepted) is also significant, namely: whether the Constitution requires that capital sentencing juries be instructed as to the effect of nonunanimity as to the sentencing verdict. The government does not even attempt to deny that there is a split of authority as among the state courts of last resort and the few federal courts to have considered this question. See Resp. Br. 14 & fn.3. This split of authority on this important constitutional question justifies this Court's certiorari review as well. See SUP. CT. R. 10(a), (b). This is particularly so, in light of the Eighth Amendment requirement of reliability in capital sentencing proceedings, and this Court's concomitant insistence that the jury be given **accurate** information about its role in capital sentencing. See discussion at Pet. 24-25. Accordingly, this Court should grant certiorari to consider the first question presented.

II. Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?

In a transparent attempt to stave off this Court's review, the government disparages this claim as "fact-bound," Resp. Br. 15, and "fact-specific," Resp. Br. 16.[2] However, this Court has never hesitated to grant review in cases requiring detailed examination of particular jury instructions and verdict forms where -- as here -- an important constitutional question is implicated. See, e.g., Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam); Mills v. Maryland, 486 U.S. 367 (1988).

At issue here is such an important constitutional question, namely: whether the Eighth Amendment right to reliable death sentences, not arbitrarily or capriciously imposed, is violated where the capital sentencing jury is erroneously led to fear that, unless the death sentence is imposed, the defendant may receive a less-than-life sentence, resulting in defendant's ultimately being released from confinement. Several Members of this Court have noted the serious Eighth Amendment problems arising from the failure to apprise jurors of the fact that, even if they do not vote for a death sentence, the defendant is unlikely ever to be released from prison. See Simmons

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[2] This is patently an attempt to invoke the admonition in the last sentence of Supreme Court Rule 10 that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As will be demonstrated, this is not such a claim.

However, even if this claim were one within the compass of the last sentence of Rule 10, that would not be the end of the story. As Justice Stevens has noted, "Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this 'generalizable principle' especially important. I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate." Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555, 1576 (1995) (Stevens, J., concurring, joined by Ginsburg and Breyer, JJ.).

v. South Carolina, 512 U.S. 154, 172-74 (1994) (Souter, J., concurring, joined by Stevens, J.) (would hold that Eighth Amendment requires capital sentencing juries to be told that a defendant is ineligible for parole); see also Brown v. Texas, ___ U.S. ___, 118 S.Ct. 355, 355-57 (1997) (opinion of Stevens, J., respecting denial of writ of certiorari, joined by Souter, Ginsburg, and Breyer, JJ.) (noting potential constitutional problems of Texas law prohibiting judges from letting capital sentencing juries know when the defendant will become eligible for parole if not sentenced to death).

The problem is exacerbated where -- as here -- there is not simply a withholding of the fact of parole ineligibility, but rather there is **affirmative misinformation** that failure to vote for death may result in a less-than-life sentence which is in actuality completely unavailable. Courts have, on more than one occasion, found an Eighth Amendment violation where a capital sentencing jury was inaccurately led to believe that there was a realistic possibility that a defendant might ultimately be released from confinement if not sentenced to death. See, e.g., Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 2299 (1998); Hamilton v. Vasquez, 17 F.3d 1149, 1159-64 (9th Cir. 1994). The issue raised by this case dovetails with this Court's repeated insistence on the need for **accurate** information in capital sentencing proceedings. See discussion at Pet. 24.

Thus, this case presents an important constitutional question which several Members of this Court have intimated that this Court should answer. And, contrary to the government's representations, Resp. Br. 15-17, this case raises at least a reasonable likelihood that the jury in this case misinterpreted the jury instructions in this case so as to raise this constitutional question.[3]

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[3] Petitioner vigorously disputes the government's contention, Resp. Br. 15, that the "plain error" standard is applicable here. This claim was sufficiently raised in the District Court. However, even if the plain error standard did apply, the error here justifies correction even under this standard.

Indeed, there is more than a reasonable likelihood; there is **absolute certainty**, based upon the affidavits executed by jurors Christie Beauregard and Cassandra Hastings.[4] These affidavits conclusively demonstrate that the jury was confused and misled by the jury instructions and verdict forms in precisely the manner urged by Petitioner: that is, the jury erroneously believed that, if they could not unanimously agree on death or life without release, it would default to the judge to impose some other "lesser sentence."

In addition to the Eighth Amendment question presented, this case also implicates the due process guarantee under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980). The government, however, claims that Hicks is distinguishable, because, in this case, the jury's sentencing options were improperly expanded, not constricted as in Hicks. The government then claims that "[h]ere, in contrast to Hicks, petitioner cannot show any harm from the submission of an extra sentencing option that the jury chose not to recommend." Resp. Br. 18.

[4] Contrary to the government's representation, Resp. Br. 17, Petitioner **does** challenge the Fifth Circuit's ruling that these affidavits may not be considered. Indeed, this is a "subsidiary question fairly included" within this question, which this Court may also consider. See SUP. CT. R. 14.1(a).

The Fifth Circuit's refusal to consider these affidavits was erroneous for a number of reasons. First, that court's reliance on Federal Rule of Evidence 606(b) was misplaced, since the Federal Rules of Evidence do not, by their own terms, apply to sentencings. See FED. R. EVID. 1101(d)(3); see also 18 U.S.C. § 3593(c) (rules of evidence do not apply to presentation of evidence during the separate sentencing hearing in a capital case). Moreover, because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," Lockett v. Ohio, 438 U.S. 586, 604 (1978), courts should be especially reluctant to utilize rules of evidence in a way that circumscribes the evaluation of the reliability of the process by which the death penalty was imposed. Cf. Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (reversing death sentence and remanding where "mechanistic" application of Georgia evidentiary rule on hearsay deprived petitioner of a fair trial on the issue of punishment). Finally, in a very similar capital sentencing instruction claim, this Court has expressed its apparent willingness to consider extrinsic evidence in determining whether there is a reasonable probability that a jury misinterpreted its instructions. See Mills v. Maryland, 486 U.S. at 381-83.

This reasoning is specious. The harm is in the reasonable likelihood -- and, indeed, the **reality**[5] -- that the jury in this case did "compromise" on a sentence of death in preference to the less-than-life sentence they (erroneously) believed would result from deadlock. As such, this case fits comfortably within the holding of Hicks that, where a jury is charged with a discretionary sentencing decision, it should be fully aware of the extent of that discretion, by being properly apprised of all its sentencing options.

Even assuming arguendo that the plain error standard of review applies, here there was plain error: the error here was clear and obvious, it affected Petitioner's substantial rights, and to leave it uncorrected would affect the public reputation and integrity of these serious capital proceedings.[6] Therefore, this Court should also grant certiorari to consider the second question presented, and all the important and recurring issues included therein.

[5] As demonstrated by the affidavits of jurors Christie Beauregard and Cassandra Hastings.

[6] If the plain error standard is to apply at all in death penalty proceedings, it should be applied much less stringently in light of the Eighth Amendment requirement of reliability in capital proceedings -- an important guarantor of which is appellate review. Indeed, this Court should grant certiorari in this case, if for no other reason, to clarify the relationship between the plain error rule of Federal Rule of Criminal Procedure 52(b) (and other plain error rules) and the reliability requirement of the Eighth Amendment.

III. Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?

The government concedes that the District Court submitted two invalid nonstatutory aggravating factors to the jury that sentenced Petitioner to death. The two nonstatutory aggravating factors were unconstitutionally vague, overbroad, and duplicative of each other. Nonetheless, the government insists that the death sentence must stand because the Fifth Circuit "properly applied harmless error analysis under this Court's precedents and the governing statute." Resp. Br. 18.

Notably, however, the government does not -- indeed it cannot -- point to any **analysis** or **explanation** by the Court of Appeals indicating how it reached the conclusion that the constitutional error was harmless beyond a reasonable doubt. The Court of Appeals baldly asserted a **conclusion** that the sentence would have been the same had the invalid aggravating factors never been submitted to the jury. Such a bald assertion is plainly insufficient. The Eighth Amendment requires "a detailed explanation based on the record" to support a finding of harmless error. Clemons v. Mississippi, 494 U.S. 738, 753 (1990). Although this Court has never precisely delineated "the degree of clarity with which [an] appellate court must reweigh in order to cure an otherwise invalid death sentence," Richmond v. Lewis, 506 U.S. 40, 48 (1992), this Court has made clear that cryptic conclusions and bare assertions will not suffice. Indeed, this Court should grant certiorari to make explicit what has been implicit in many previous holdings: "[A] bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring).

The government states that "the court of appeals set forth its harmless error methodology in detail." Resp. Br. 20. The government's use of the word "methodology" is significant. It is true that

the opinion of the Court of Appeals spends four paragraphs discussing this Court's precedents on harmless error in cases in which an unconstitutional aggravating factor has infected the sentencing process -- in particular, Clemons and Stringer v. Black, 503 U.S. 222 (1992). But most significantly, the court's **application** of that "methodology" consists of only one sentence: "After removing the two nonstatutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors." Jones, 132 F.3d at 252.

This is precisely the sort of "cryptic" conclusion of harmless error condemned by this Court in Clemons, 494 U.S. at 753. As this Court has made clear, "when the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the . . . appellate court . . . must actually perform a new sentencing calculus, if the sentence is to stand." Richmond v. Lewis, 506 U.S. 40, 49 (1992). Once the jury's sentence was found to be unconstitutional, the Court of Appeals in effect became the sentencer in this case. Petitioner has a right under the Eighth Amendment to an individualized determination of his sentence. The sentencer must consider all mitigating evidence, and, under this statute, weigh the mitigating factors against the valid aggravating factors. The "new sentencing calculus" required in this case, therefore, must include, at a minimum, a discussion of the mitigating evidence and how heavily it weighs in the balance against the valid aggravating factors.

Contrary to the government's assertion, the Court of Appeals, in the portion of its opinion purporting to apply harmless error analysis, did not discuss any of the mitigating evidence, nor did it even list the eleven mitigating factors found by at least one of the jurors. And as detailed in Petitioner's petition, that mitigating evidence was substantial. See Pet. 32-33. In Clemons, this Court noted that "the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury." Clemons, 494

U.S. at 752. The only difference is that the Fifth Circuit's opinion here is **completely silent** with respect to the particulars of the mitigating evidence.

Clemons is therefore squarely on point. The government's assertion that this case "bears no resemblance to Clemons" (Resp. Br. 20) is remarkable for its inaccuracy. Not surprisingly, the government offers no explanation as to how Clemons is distinguishable.

The Fifth Circuit's blatant misapplication of this Court's precedents is especially significant here because this is the first case in the nation tried and appealed under the Federal Death Penalty Act of 1994. Accordingly, the Fifth Circuit's erroneous opinion takes on added importance. As superintendent of the lower federal courts, this Court should grant certiorari and correct this error. Moreover, the opinion has significance far beyond the FDPA. Many states employ weighing capital punishment schemes similar to that of the federal statute. Up until now, the law on harmless error under such statutes has been clear. If allowed to stand, the Fifth Circuit's blatant disregard of the law could sow needless confusion for many state courts administering similar statutes, as well as for federal courts in habeas corpus review of death sentences in weighing states.

For all the foregoing reasons, this Court should grant certiorari to consider the third question presented.

IV. Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?

The government claims that the Fifth Circuit "addressed" all of the issues raised by Petitioner on appeal, within the meaning of § 3595(c)(1), when that court summarily stated (1) that it had considered all of Petitioner's issues (without even specifying what fourteen of the eighteen issues were) and (2) that it affirmed Petitioner's convictions and death sentence. See Resp. Br. 22. But the government's stunted view of the term "address" under § 3595(c)(1) would render that provision entirely superfluous, since it adds nothing to what courts of appeals are already required to do -- i.e., to consider and decide all the claims brought before them.[7] Furthermore, the use of the word "consider" within the very same sentence in § 3595(c)(1) suggests that, contrary to the government's argument, "address" must mean something more than simply to "consider."

The government also fails to account for the requirement, in § 3593(c)(3), that the court of appeals "shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section." Remarkably, the government concludes that this requirement was satisfied by this statement by the Court of Appeals: "the sentencing provisions of the Federal Death Penalty Act are constitutional, and [ ] petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor." See Resp. Br. 22-23 (quoting United States v. Jones, 132 F.3d 232, 253 (5th Cir. 1998)). But these are not **reasons** -- these are **conclusions**. Furthermore, these conclusions address only a small portion of the issues raised by Petitioner and the otherwise mandated appellate review. They do not even begin to address the other "substantive and procedural issues," see § 3595(c)(1), raised by Petitioner.

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[7] The government does not suggest that, in noncapital cases not governed by § 3595(c)(1), the courts of appeals are free to pick and choose which issues they are going to decide.

The only way to make sense of the requirements of § 3595 is to read these as Petitioner does, namely: that the courts of appeals are required to discuss "each substantive and procedural issue" raised by a death-sentenced individual and to explain -- even if only briefly -- the reasons for their disposition of each issue.[8] The government's interpretation, taken to its logical extreme, would permit a court of appeals to discharge its responsibilities under § 3595(c)(1) and (3) by issuing a one-sentence opinion: "We have considered all of the issues raised by defendant, and we affirm." Surely Congress had something more in mind than this empty formality when it passed § 3595(c)(1) and (3).

The government also argues that any error is harmless because "[e]ach of the claims petitioner raises in this Court, however, was discussed and resolved in writing by the court of appeals. The only claims that petitioner argues were not disposed of by 'full opinion' are claims that he has chosen not to renew here." Resp. Br. 23. The government overlooks the fact that a written opinion on **all** of the issues raised by Petitioner in his appeal could have caused Petitioner drastically to alter the focus of his cert. petition. It is difficult or impossible to divine "cert.-worthy" error where the lower court's reasoning does not appear.

Furthermore, it is questionable whether harmless error analysis should even apply because of the important institutional and systemic interests served by the opinion requirements of § 3595(c)(1) and (3). Requiring a court of appeals to articulate its reasons for disposing of all of a death-sentenced individual's claims has value to society at large, to assure the public that there has been the searching appellate review necessary to ensure that the death penalty is not arbitrarily and capriciously imposed.

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[8] Even if Petitioner's interpretation were not the most compelling both textually and as a matter of policy, however, it cannot be gainsaid that it is at least plausible; and therefore that interpretation is also required by application of the rule of lenity.

Because of the importance of appellate review to assure the constitutionality of death penalty schemes, this Court should grant certiorari to consider the requirements of § 3595(c)(1) and (3). In this regard, it should be noted that, unlike death penalty cases arising out of state courts, in which cases both state and federal review is available, here Petitioner will have his case reviewed by only one set of courts (the federal courts).

Moreover, because this case is on petition for certiorari from a direct appeal in federal court, this Court has a special responsibility to ensure that justice is done. Thus, it is peculiarly appropriate for this Court to grant certiorari on this issue in the Court's role as the supervisor of the lower federal courts. Accordingly, Petitioner prays that this Court grant certiorari to consider this question.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in petitioner's original Petition for Writ of Certiorari, this Court should grant certiorari to review the judgment and opinion of the Fifth Circuit in this matter.

Respectfully submitted,

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ORIGINAL

September 24, 1998

FEDERAL EXPRESS

William K. Suter
Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: Louis Jones, Jr. v. United States, No. 97-9361

Dear Mr. Suter: Supplemental

As directed by members of your office, I am hereby submitting the following supplemental authority for consideration by the Court with respect to the petition for writ of certiorari filed in the above-referenced matter:

> **Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones, 132 F.3d 232 (5th Cir. 1998)*, 29 Tex. Tech. L. Rev. 1043 (1998)**

This authority bears upon the first three questions presented in Mr. Jones's petition. As a convenience to the Court, I append a copy of this authority to this letter.

I have submitted the original and 10 copies of this letter and the appended supplemental authority for filing with the Court. **As I have been informed that this case is set for conference by the Court on Monday, September 28, 1998, I have sent these documents via Federal Express, overnight delivery.**

I have also mailed, via United States first-class mail, postage prepaid, a copy of the letter and authority to each of the persons listed below.

64 pp

Thanking you for your attention to this matter, I remain,

Respectfully yours,

Timothy Crooks

Timothy Crooks
Asst. Federal Public Defender and
Appellate Chief

Attachment

cc w/ encl:

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Texas Tech Law Review
1998

Comment

*1043 TESTING THE FEDERAL DEATH PENALTY ACT OF 1994, 18 U.S.C. §§ 3591-98 (1994): UNITED STATES V. JONES, 132 F.3D 232 (5TH CIR. 1998)

Charles C. Boettcher

*1044 "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." [FN1]

I. Introduction

On January 5, 1998, the United States Court of Appeals for the Fifth Circuit handed down United States v. Jones, the first federal appellate court *1045 opinion to construe the Federal Death Penalty Act of 1994 (FDPA). [FN2] In Jones, the defendant appealed the imposition of a death sentence pursuant to the FDPA following a conviction for "kidnapping with murder resulting" under section 1201 of the Federal Kidnapping Act. [FN3] The defendant raised two types of error on appeal: (1) constitutional challenges to the FDPA, and (2) challenges alleging arbitrary and capricious imposition of the death sentence due to confusion concerning the jury instructions and redundancy/duplication in the aggravating factors. [FN4] The Fifth Circuit addressed these points of error in a systematic and workmanlike manner, thereby providing a great deal of insight into the workings of the FDPA.

Although the Fifth Circuit's opinion is secured in longevity as a landmark decision in federal death penalty law, the court's opinion is suspect in many regards. The precedential value of the court's interpretation of the FDPA and its conclusions regarding the jury instructions and aggravating factors used in Jones is undermined by the court's failure to provide detailed analysis and crucial support. [FN5] As the first appellate court to review the provisions of the FDPA (only a handful of district courts had previously decided cases under the FDPA), [FN6] the Fifth Circuit broke ground for all federal *1046 courts. In so doing, however, the Fifth Circuit made many hasty conclusions with seemingly little support. [FN7] At times, the court avoided conducting a detailed statutory analysis. [FN8] The court simply made bare conclusions supported by attenuated, and sometimes incorrect, analysis of the FDPA. [FN9] Additionally, when faced with reviewing the decision of the district court by reconsidering the evidence, the Fifth Circuit seemed partial to affirming the sentence of death. [FN10] Therefore, the weighing fell in favor of the government. [FN11]

This note commences by examining the federal death penalty law prior to United States v. Jones. After reviewing the historical roots of the procedural protections embodied in the FDPA, the actual provisions of the statute are examined in great detail. Finally, with this background, this note analyzes the Fifth Circuit's opinion in United States v. Jones. II. History of Capital Punishment on the Federal Level

The United States has struggled with the issue of capital punishment throughout history. [FN12] From approximately 1930 to 1971, the states and the federal government executed 3,859 criminals. [FN13] However, the number of executions steadily declined during the latter years of this period, with only ten executions occurring from 1965 to 1971. [FN14] The federal government performed capital punishment for the last time in a 1963 hanging of an Iowa man convicted of murder and kidnapping. [FN15] By the time the United States Supreme

Court handed down its decision in Furman v. Georgia, [FN16] the federa *104' government had practically abandoned executions. [FN17] The federal govern-ment's move away from the imposition of capital punishment seemed to reflect growing public sentiment against capital punishment. [FN18] After the Court's 1972 opinion in Furman, the federal government completely abandoned the death penalty and refused to revive a federal death penalty scheme until 1988. [FN19]

A. The Broad Sweep of Furman

In 1972, the United States Supreme Court opinion in Furman v. Georgia ushered in an upheaval in capital punishment and death penalty provisions for both federal and state capital punishment law. [FN20] In Furman, three petitioners-one rapist from Georgia, one murderer from Georgia, and one rapist from Texas-challenged their respective states' death penalty statutes as violating the Eighth Amendment prohibition against cruel and unusual punishment. [FN21] The Court released a per curiam opinion, holding simply "that the imposition and carrying out of the death penalty in these cases constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [FN22] Because the per curiam opinion merely reversed and remanded, the Court's holding seemed limited to the three cases before it. [FN23] If construed in such a light, the Court's holding in Furman would have only struck down the death penalty statutes in Georgia and Texas. [FN24] The holding, however, reached farther than just the statutes in Georgia and Texas.

*1048 The per curiam opinion in Furman was accompanied by nine separate non-joining opinions-five concurring and four dissenting. [FN25] The five Justice majority was further segmented into three separate camps: (1) Justices Stewart and White agreed that the imposition of the death penalty was arbitrary and capricious, (2) Justice Douglas focused more on the inconsistent application of the death penalty based on the personal attributes of the defendant, and (3) Justices Marshall and Brennan, writing the longest opinions for the Court, believed the death penalty to be unconstitutional in all circumstances. [FN26] Because Justices Marshall and Brennan opposed any imposition of the death penalty, Justices Stewart, White, and Douglas provided the pivotal voices for the Court.

In the shortest and most far-reaching opinion of the nine, Justice Stewart emphatically proclaimed the sentences to be " 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." [FN27] He characterized the petitioner's death sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." [FN28] Justice Stewart declared the death penalty unconstitutional "under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." [FN29] Consequently, the opinion extended beyond the three cases before the Court. By condemning any statute or capital punishment scheme resembling those in Georgia and Texas, Justice Stewart's opinion implied that the death penalty statutes of other states, as well as the federal government, would be reviewed with the same scrutiny as that employed in Furman. [FN30] In essence, the Court invalidated all state and federal capital punishment procedures which presented a "substantial risk that death would be imposed in an arbitrary or capricious manner." [FN31] Because all state *1049 and federal statutes were thought to embody the risk identified in Furman, the Supreme Court's decision effectively emptied death rows by invalidating the death sentences of over 600 inmates awaiting execution. [FN32]

Responding to the dearth that Furman left behind, many states rushed to change their death penalty statutes. [FN33] The federal government, in turn, revised the Federal Aviation Act of 1958 by implementing new death penalty procedures, [FN34] and the Kidnapping Act by removing the death penalty provision altogether. [FN35] However, the remaining federal death penalty statutes were effectively abandoned as unconstitutional under Furman. [FN36] Due to their dormant nature, these federal death penalty statutes later acquired the fitting title of "zombie statutes." [FN37]

B. In the Wake of Furman

Four years after Furman, the Supreme Court in Gregg v. Georgia again faced a Georgia death penalty case-this

time the petitioner faced death for two counts of armed robbery and two counts of murder. [FN38] However, unlike the death sentence found unconstitutional in Furman, the death sentence a *1050 issue in Gregg arose under a new capital punishment scheme enacted by the Georgia Legislature in an effort to comply with the scope of Furman. [FN39] The new Georgia scheme embodied a two-stage procedure: "a guilt stage and a sentencing stage." [FN40] Although Georgia law still provided for death or life imprisonment for murder, the sentencing stage contained safeguards against arbitrary imposition of the death penalty. [FN41] At the outset, the new statute only allowed the death penalty to be imposed for six statutorily defined crimes. [FN42] In addition, the statute performed a narrowing function by requiring a finding beyond a reasonable doubt of at least one of the ten statutorily defined aggravating factors. [FN43] Further, the statute allowed the jury unlimited discretion to consider "non-statutory mitigating factors" and additional "non-statutory aggravating factors" before making the decision to impose death. [FN44]

Although these two functions seemed at odds, first narrowing the class and then permitting almost unfettered discretion, the process achieved a channeling of discretion that satisfied the Furman requirements. [FN45] In addition, the statute required an automatic appeal to the Georgia Supreme Court for any sentence of death. [FN46] Finally, the statute required the Georgia Supreme Court to ensure that: (1) passion or prejudice did not influence the decision, (2) sufficient evidence supported the finding of at least one statutory aggravating factor, and (3) the sentence was not disproportionate when compared to sentences in other similar cases. [FN47]

*1051 In the plurality opinion of Justices Stewart, Powell, and Stevens, the Court upheld both Georgia's new statutory death penalty provisions and the sentence against the defendant, Gregg. [FN48] The Court first found that the death penalty was not per se unconstitutional as a violation of the "cruel and unusual punishment" clause of the Eighth Amendment. [FN49] Next, the Supreme Court highlighted the important procedural safeguards embodied in the new Georgia death penalty statute, and the Court addressed the petitioner's generic attacks on the statute. [FN50] The Court focused on the bifurcated proceedings. [FN51] Additionally, the court highlighted the importance of ensuring that the jury was adequately informed of relevant information and provided with standards to guide its decision. [FN52] The Court concluded that the new Georgia sentencing procedures, by contrast to the procedures reviewed in Furman, focused the jury's attention to the particular crime and the particular defendant. [FN53] The Court held that the jury's discretion was sufficiently directed and limited in order to minimize arbitrary and capricious action by the jury, thereby satisfying Furman. [FN54] Consequently, the Court affirmed the defendant's death sentence pursuant to the statute. [FN55]

On the same day as the decision in Gregg, the Court decided four companion cases: Proffitt v. Florida, [FN56] Jurek v. Texas, [FN57] Woodson v. North Carolina, [FN58] and Roberts v. Louisiana. [FN59] The decisions of the Court were given by the same plurality as in Gregg. [FN60]

In Proffitt, the Court upheld Florida's death penalty scheme, which was similar to Gregg in all respects except that the jury's verdict in the sentencing hearing was only advisory with the trial judge making the ultimate decision. [FN61] The Court in Jurek upheld Texas' distinct capital punishment scheme, whicl *1052 statutorily defined a separate offense of capital murder, and required the jury to answer three questions affirmatively before the death penalty could be enforced. [FN62] However, the Court rejected the death penalty schemes in Woodson and Roberts because North Carolina and Louisiana had created capital punishment schemes that provided mandatory death sentences for certain murder offenses, thereby denying the convicted defendant the opportunity to put on character evidence and receive an "individualized sentencing." [FN63] These procedures stood in sharp contrast to the procedures at issue in Gregg, Proffitt, and Jurek, which compelled the jury to consider the circumstances of the crime and the characteristics of the criminal. [FN64] Although the Court in Woodson recognized that other crimes receiving mandatory sentences were constitutionally permissible, the Court insightfully noted that "death is qualitatively different." [FN65] So different, in fact, that mandatory sentences of death should be viewed as unconstitutional. [FN66]

Through Gregg and its brethren in the wake of Furman, the Court provided a good road-map establishing what types of statutory procedures, promulgated by the states and federal government, satisfy the Eighth Amendment's

prohibition against cruel and unusual punishment. First, mandatory death sentencing is constitutionally impermissible. [FN67] Second, imposition of the death penalty cannot be done arbitrarily, capriciously, or in a wanton or freakish way. [FN68] Third, sentencing should be carried out by th *105 jury, but a judge could make the decision as long as the jury played a role. [FN69] Fourth, and arguably most important, the discretion allocated to the jury should be channeled while allowing for an individualized sentencing at the same time. [FN70] In essence, the jury should look at both the circumstances of the crime and the individual characteristics/record of the criminal defendant. [FN71] Fifth, the jury should be adequately informed of all necessary information and be guided in the decision-making process. [FN72] Sixth, a bifurcated trial with separate guilt and sentencing stages should be employed. [FN73] Finally, in order to satisfy the Eighth Amendment, "meaningful appellate review" must be provided by the highest appellate court in the jurisdiction; however, an automatic right to appeal is not necessarily required. [FN74]

The Court primarily looked to Georgia's procedures as a guide to compliance with the standards of Furman. [FN75] However, the Court noted that Georgia's procedures were not the only permissible procedures under Furman and that similar procedures would not automatically satisfy the concerns of Furman. [FN76] Thereby, the Court established a road-map, but seemingly reserved the right to review each jurisdiction's procedures in their totality to determine if the procedures complied with the mandates of Furman.

C. The Labored Political Push Toward a Federal Death Penalty Scheme

The federal government, unlike most of the states, took its time in enacting new legislation responding to the Supreme Court's death penalty jurisprudence. [FN77] This slow response was attributable, at least in part, to the Democratic Party's control of both houses of Congress as well as the Presidency from 1976- 80. [FN78] The Democratic Party traditionally expressed greater opposition to the death penalty than the Republican Party. [FN79] However, pro-death penalty political strength began to grow from 1980 to 1992 unde *105 the strong Republican Presidential leadership of Ronald Reagan and George Bush. [FN80] While the Democratic Party controlled Congress and the Republican Party controlled the Presidency, the compromising nature of politics coupled Congress and the President in an effort to bring back a federal death penalty scheme. [FN81]

The political change of the 1980's, most notably the re-election of Republican President Ronald Reagan with a political mandate for his second term, ushered in a new wave of anti-crime legislation. [FN82] During this time, the enactment of the Sentencing Reform Act of 1984 [FN83] triggered an increased debate over the merits of the death penalty and the possible implementation of the death penalty through revised statutory decrees consistent with Furman. [FN84] Although the Sentencing Reform Act passed, the political pressure for a federal death penalty scheme was silently quashed and left for another day. [FN85]

In the years to follow, the push for a federal capital punishment scheme gained minimal ground with the passing of the Anti-Drug Abuse & Death Penalty Act of 1988 (Drug Kingpin Act). [FN86] This Act added the death penalty for a very narrow realm of cases in which murder resulted during a drug related offense. [FN87] Although nicknamed the Drug Kingpin Act, the nickname is deceiving, as implementation of the death penalty is not limited solely to "drug kingpins." [FN88] Under the Act, anyone involved in a drug enterprise, nc *105 just the kingpins, could receive the death penalty for murder resulting from a drug related offense. [FN89] However, to receive the death penalty, the murderer would still have to act with "intention," and numerous procedures helped meet the demands of Furman. [FN90]

The push for a federal death penalty scheme received heightened support when George Bush became President of the United States in 1989. [FN91] In 1989, Senator Strom Thurmond introduced a bill entitled the Federal Death Penalty Act of 1989 [FN92] as a sub-chapter of his bill entitled the "Comprehensive Violent Crime Control Act of 1989." [FN93] However, with the Democratic party in control of both houses of Congress, the political climate halted the passage of a federal death penalty act as all-inclusive as Senator Thurmond's proposal. [FN94] Year after year, Senator Strom Thurmond reintroduced the Federal Death Penalty Act. [FN95] However, Senator Thurmond was consistently disappointed. [FN96]

*1056 Democrats quickly became equally vocal in the push for a federal death penalty scheme. [FN97] Exemplifying once again the compromising nature of politics, Republican Senator Thurmond and Democratic Senator Biden joined together in 1991 to propose a bi-partisan version of the death penalty legislation first proposed in 1989. [FN98] While this proposal also failed to pass, the apparent elimination of party politics helped to further the push toward a federal death penalty scheme. The election of Bill Clinton as President in 1992 seemed to put the crime issue in the Democrats hands. [FN99] While purporting to be "tough on crime," however, President Clinton failed to pass a crime bill in the first two years of his term. [FN100]

Due to the nature of politics, the Republican party ended-up switching sides and fighting against the bill. [FN101] Still, it did not take long for Congress to pass the Violent Crime Control and Law Enforcement Act of 1993 and the Federal Death Penalty Act of 1994 as an internal sub-chapter of that Act. [FN102] While the Democratic Party ended up taking the credit, Republicans were equally pleased with the new federal death penalty scheme. [FN103] In fact, the FDPA was the most heavily publicized portion of the Crime Control Act, and arguably one of the most instrumental to the bill's passage. [FN104]

*1057 The Federal Death Penalty Act of 1994 was a revolution for federal capital punishment. For the first time, the federal government broadly addressed the constitutional demands of Furman for all crimes punishable by death under federal law. [FN105] The Federal Death Penalty Act of 1994, in effect, created a procedural/substantive dichotomy among the federal statutes. The FDPA represented the procedural side of the death penalty scheme, while the ability to qualify a criminal for the death penalty was left to scattered substantive provisions in Title 18 of the United States Code-some in existence prior to the FDPA and others enacted by the FDPA. [FN106] All told, the FDPA applied new procedures to around sixty substantive death eligible offenses. [FN107] The FDPA marked a huge expansion of federal death penalty law by any standard of measurement. For the most part, the FDPA provided the same procedural protections as the Drug Kingpin Act, [FN108] only on a broader scale because of the sixty death eligible crimes subject to the procedures of the FDPA. [FN109]

III. A Look at the Federal Death Penalty Act of 1994

While the Court in Gregg warned against interpreting its opinion as suggesting that the procedures present in Georgia's statute were the only procedures that satisfy the requirements of Furman, the Court also warned that a sentencing scheme designed along the lines of Georgia's statute in Gregg would not automatically satisfy the constitutional concerns of Furman. [FN110] Nonetheless, the FDPA seems to be closely modeled after the Georgia statute in Gregg. [FN111] On the whole, however, the FDPA goes abov *1058 and beyond the requirements of the Georgia death penalty statute. [FN112] However, some areas of the FDPA have been challenged as falling short of the requirements outlined by the Court in Furman, Gregg, and more recent Supreme Court death penalty jurisprudence. [FN113]

A. Death Eligible Crimes

1. The Crimes

It has been said that the FDPA [FN114] created over sixty new death eligible crimes. [FN115] However, the FDPA did not create sixty death eligible crimes, but actually created only around twenty new death eligible crimes. [FN116] Two of the crimes created by the FDPA are codified in the main portion of the statute. [FN117] The other eighteen or more crimes created by the FDPA are codified in scattered sections of Title 18 of the United States Code, presumably to place them within the category of the Code relating to the substantive offense being made death eligible. [FN118]

The remainder of thesixty purported crimes were not actually created by the FDPA. The FDPA merely applies its procedural provisions to these crimes, making them death eligible. [FN119] This incorporation is achieved through broad language in section 3591(a)(2), making the procedural provision *1059 applicable to "any other offense for which a sentence of death is provided." [FN120] Approximately seventeen of these referenced crimes

were already eligible for imposition of the death penalty prior to the enactment of the FDPA. [FN121] The statutes which make these crimes eligible for death, appropriately referred to as "zombie statutes" because of their dormant nature after Furman, [FN122] were effectively revived from their statutory "Never- Never Land" by the FDPA. [FN123] Further, at least eight other crimes that existed prior to the FDPA are now death penalty eligible. [FN124]

Although the FDPA did make some new crimes death eligible, its most impacting effect on federal death penalty jurisprudence is its codification of "procedures for the imposition of the death penalty" which "comport[] with the constitutional requirements outlined by the Supreme Court." [FN125] All told, the FDPA's procedural provisions apply to over forty-five crimes. [FN126]

*1060 The vast array of crimes eligible for the death penalty under the FDPA can be divided into three arenas: (1) crimes in which a person is intentionally killed, (2) crimes in which a dangerous activity results in a person's death, and (3) non-homicide related crimes. [FN127] The first arena encompasses over fourteen crimes, and the second arena holds over sixteen crimes. [FN128] The third arena, by contrast, contains only four death-eligible crimes: treason; [FN129] espionage; [FN130] continuing criminal enterprise- related drug trafficking involving large quantities of drugs; [FN131] and a drug kingpin's acts toward obstructing an investigation of a "continuing criminal enterprise" and involving an order or personal attempt to kill a "public officer, juror, witness, or member[] of the family or household of such a person." [FN132]

2. Constitutionality of the Penalties for Non-Homicide Crimes

The last arena of crimes poses the most interesting constitutional questions. Prior to the passage of the FDPA, both treason and espionage qualified as death-eligible crimes. [FN133] Although at least one commentator felt that these crimes were enforceable as codified, [FN134] the newly added procedural safeguards help to ensure that the death penalty for these two crimes will sustain constitutional scrutiny. The imposition of a death penalty for treason and espionage is seemingly constitutional partially because of the historical death-eligibility of these crimes. [FN135] The two non-homicide death-eligible drug *1061 crimes, however, have less of a chance of passing constitutional muster since they are not as rooted in historical precedent. [FN136]

Initially, these death-eligible drug crimes fly in the face of Coker v. Georgia. [FN137] Although the holding of Coker implied that any sentence of death for a non-homicide offense would be unconstitutional, [FN138] treason and espionage are still viewed to be exceptions to this holding because of their historical precedent and significant impact on society. [FN139] By seeking to classify drug trafficking on the same par as murder, treason, and espionage in its significant injury to society, Congress arguably intended to bypass this constitutional hurdle. [FN140] Possibly to bolster the constitutional validity of the two non-homicide death-eligible drug crimes, Congress included a specific list of nine aggravating factors for these crimes. [FN141] By providing this specific list of aggravating factors for the drug crimes, Congress seems to have gone to great lengths to ensure that the class of eligible defendants is sufficiently narrow to pass constitutional muster. After Coker, no state has sentenced a defendant to death for a non-homicide related crime. [FN142] Therefore, Congress is on its own in testing the constitutional waters of the death penalty for drug-related crimes, treason, and espionage.

While both non-homicide drug offenses pose general constitutional problems under Coker, one of the crimes poses additional constitutional *1062 problems. The validity of a sentence of death for drug trafficking defined in 18 U.S.C. § 3591(b)(1) is additionally suspect due to problems in application. [FN143] Because the statute applies generally to dealers of "large quantities of drugs," [FN144] the interpretation of what qualifies as a large quantity of drugs could lead to violations of the equal protection clause and substantive due process. [FN145] The constitutional problems arise from a disparate treatment of powder and crack cocaine under federal criminal law. [FN146] Although federal criminal law views 300 kilograms of powder cocaine as a large quantity, merely three kilograms of crack cocaine qualifies as a large quantity. [FN147] With the possibility of disparate results, death-eligibility of drug trafficking as defined in section 3591(b)(1) is even less likely to pass review under the United States Constitution.

While many federal crimes are now death eligible, the initial step toward a sentence of death remains in the hands of the prosecutor for the government. [FN148] The prosecutor may choose either to seek the death penalty or forego the possibility of imposing a sentence of death. [FN149] If the prosecutor chooses to seek the death penalty, the FDPA requires the prosecutor to make an outward manifestation of the government's intent to seek the death penalty. [FN150]

B. Intention to Seek the Death Penalty

Full discretion is vested in the prosecutor, in light of the circumstances of the case, to decide whether to seek the death penalty for a case subject to the procedures of the FDPA. [FN151] Exceeding the call of Gregg, the FDPA requires the prosecutor to serve a notice of intention to seek the death penalty upon the defendant within a "reasonable time" before the trial or before acceptance of a plea of guilty. [FN152] This "reasonable time" language has not been interpreted by any federal court, under either the Drug Kingpin Act or the FDPA. [FN153] In light of the fact that the notice requirement exceeds the *1063 procedures of the Georgia statute in Gregg, [FN154] a defendant would likely achieve little success in challenging a "late notice" on constitutional grounds. Courts are likely to allow any notice submitted before trial to stand as good notice, but if it is submitted after trial, courts would probably find a violation of the statute. [FN155] This, however, raises additional questions as to how to deal with a statutory violation of the FDPA. [FN156]

The purpose of the notice of intent to seek the death penalty is two- fold: (1) to put the defendant on notice, and (2) to convey information to the defendant. [FN157] The notice must include a statement that the Government has found the circumstances of the crime to justify a sentence of death if the defendant were convicted, [FN158] and the notice must list the aggravating factor(s) the government will seek to prove. [FN159] While the notification requirement of the FDPA requires the government to list circumstances justifying a death sentence, this requirement does not appear to add anything more to the general notice requirement of the Drug Kingpin Act. [FN160] The second purpose of the notice is crucial, however. By giving the defendant notice of what aggravating factors the government will seek to prove, the defendant is allowed an opportunity to challenge the aggravating factors and to receive the district court's pre-trial judgment as to which aggravating factors are constitutionally valid. [FN161] Thereby, potential prejudice at the sentencing *1064 hearing can be avoided. Although the defendant is entitled to notice of these aggravating factors, at least one district court has held that the notice cannot be compelled until the government has decided to issue its intent to seek the death penalty. [FN162]

Representing a significant difference from the Drug Kingpin Act, the FDPA specifically allows the aggravating factors to include the effect of the criminal act on the victim and the victim's family. [FN163] In addition, victim impact statements are specifically authorized. [FN164]

After issuing its notice of intention to seek the death penalty, the government proceeds with the trial of the defendant. [FN165] As with the Drug Kingpin Act, the court may amend the notice upon a showing of "good cause." [FN166] Presumably, the notice can be amended at any time. [FN167] If the government receives a conviction, the defendant is entitled to a separate sentencing hearing. [FN168]

C. Sentencing Hearing

Section 3593, entitled "Special hearing to determine whether a sentence of death is justified" serves as the heart of the FDPA. [FN169] That section imposes two requirements prior to the sentencing hearing. [FN170] First, the notice of intention to seek the death penalty must have been properly served. [FN171] Second, the defendant must have been found guilty of a crime or pled guilty to a crime governed by the FDPA. [FN172] After satisfying these prerequisites, the jury which determined the defendant's guilt (or a new jury under the proper circumstances) [FN173] shall be impaneled at the sentencing hearing. [FN174] This procedure creates a bifurcated proceeding for federal death penalty cases, *1065 similar to the Georgia statutory scheme involved in Gregg. [FN175] While the FDPA provides no new procedural restraints at the trial stage, the FDPA provides numerous procedures for the sentencing hearing. [FN176]

1. Statutory Aggravating Factors

At the sentencing hearing, the FDPA vests ultimate discretion with the jury to determine whether the convicted defendant will be sentenced to death. [FN177] The district court cannot alter the jury's decision. [FN178] Because a jury ultimately decides imposition of the death penalty, Furman and its progeny require that the jury's discretion be guided and that the jury be informed of the circumstances of the crime as well as the record and characteristics of the individual. [FN179] The FDPA provides this guidance through detailed procedures with respect to aggravating and mitigating factors. [FN180]

a. Threshold Requirement of Intent

With the exception of the non-homicide offenses, [FN181] the FDPA initially guides the jury's discretion by narrowing the class of death eligible criminals to certain statutory offenses where someone was intentionally killed or death resulted as the product of a dangerous activity. [FN182] To reinforce this purpose, the FDPA requires that the jury make a unanimous threshold finding, beyond a reasonable doubt, of at least one of four statutorily defined aggravating factors. [FN183] The four factors are essentially divided into two groups, with two factors in each group. [FN184] The first group of factors apply to intentional crimes, and the two factors require either a finding of an intentional killing or intentional infliction of serious bodily injury resulting in death. [FN185] The second group of factors apply to those crimes involving a dangerous activity resulting in death, and the two factors require either an assumption of the risk of death or creation of a "grave risk." [FN186] Although these four factors can be separated *1066 into the two aforementioned groups, the jury is asked only to find one aggravating factor from among the list of four. [FN187]

b. Additional Narrowing Function

In a continuation of this narrowing function, the jury must also find at least one statutorily defined aggravating factor from a second list. [FN188] In order to eliminate jury confusion resulting from the introduction of irrelevant factors from the list, the government must choose the statutory aggravating factors it will submit to the jury. [FN189] As the government is limited to the statutory aggravating factors appearing in its notice of intent to seek the death penalty, the government must firmly decide which factors it wishes to pursue before issuing its notice. [FN190] In choosing factors, the government is limited to one of three lists of aggravating factors in section 3592. [FN191] The lists are categorized according to the type of crime involved, and the government must select the aggravating factors from the appropriate list. [FN192] There are sixteen factors for homicide offenses, [FN193] three factors for espionage or treason, [FN194] and eight factors for the two drug-related offenses defined in section 3591. [FN195]

*1067 c. The Drug Kingpin Act's Aggravating Factors-In Contrast

In contrast to the clarity of these two narrowing stages of the FDPA, the Drug Kingpin Act's two narrowing stages statutorily overlap. In fact, the Drug Kingpin Act seems to provide for three narrowing stages. [FN196] First, in order to even qualify for death, the defendant must meet a special intent requirement. [FN197] Second, the jury is required to find one statutory aggravating factor from among a list of four possible factors referring to the defendant's intent. [FN198] These two stages overlap each other to accomplish exactly the same narrowing as the first narrowing stage of the FDPA. [FN199] Third, the jury is required to find at least one statutory aggravating factor from among the remaining list of eleven aggravating factors. [FN200] As with the FDPA, however, the Drug Kingpin Act requires the jury to be unanimous in finding each aggravating factor beyond a reasonable doubt. [FN201]

In addition to the statutory aggravating factors of the FDPA which successfully satisfy the narrowing requirement, the government can also create other non-statutory aggravating factors to submit to the jury.

*1068 2. Non-Statutory Aggravating Factors

The FDPA allows the government to create aggravating factors specifically geared to the particular facts of the case. [FN202] As with the statutory aggravating factors, these aggravating factors must be listed in the notice of intent to seek the death penalty. [FN203] While the jury does not need to find any non-statutory aggravating factor(s) to proceed with the imposition of death, the government often submits them in its intent to seek the death penalty anyway. The government submits these factors in order to aide the jury in weighing what the government believes to be the relevant factors in favor of a death sentence. Although the government can gain an advantage by using non- statutory aggravating factors, these factors are often the basis of constitutional challenges. Defendants have challenged the prosecutor's discretion as an improper delegation of legislative power by Congress. [FN204] Defendants have also challenged both statutory and non-statutory aggravating factors for being too vague [FN205] and too duplicative in violation of due process. [FN206]

Although challenges of improper delegation of authority have been uniformly struck down, [FN207] the vagueness and duplication challenges have enjoyed some success among the district courts and appellate courts interpreting the Drug Kingpin Act. [FN208] Challenges concerning improper vagueness and duplication are equally applicable to statutory aggravating factors. [FN209] However, the statutory aggravating factors have less chance of being found vague or duplicative because Congress will usually take great care when drafting such legislation. Additionally, judicial deference to the legislature increases the burden on a defendant alleging vagueness and duplication of statutory aggravating factors. [FN210] In contrast, non-statutor *106 aggravating factors are created by a prosecutor who has little experience with legislative drafting. [FN211] Therefore, the non-statutory aggravating factors should receive less judicial deference because of the significant danger of vagueness and duplication.

With the statutory and non-statutory aggravating factors, the FDPA ensures compliance with the requirement's of the Court in Gregg-that the jury's discretion be focused on the particular crime involved. [FN212] By requiring the jury to make a finding of at least one statutory aggravating factor regarding intent and at least one statutory aggravating factor from a crime- specific list of aggravating factors, the FDPA performs a narrowing of the pool of death-eligible criminals and ensures that each criminal is evaluated on the basis of his own, individual crime. [FN213] In tandem with the narrowing requirement, the Court in Gregg also required that the jury's discretion be focused on the record and characteristics of the particular defendant in the particular case. [FN214] While some of the aggravating factors work to achieve this goal, [FN215] the bulk of this requirement is satisfied by the defendant in mitigation of his crime. [FN216] To this end, the FDPA allows the defendant to submit mitigating factors to the jury at the sentencing hearing. [FN217]

3. Mitigating Factors

While the government bears the responsibility of submitting aggravating factors, the defendant has the responsibility to submit mitigating factors. [FN218] The FDPA statutorily provides for seven mitigating factors. [FN219] In addition to *1070 the seven statutorily defined factors, the FDPA also provides for the admission of any other factor in the "defendant's background, record, or character" and any circumstances of the offense which help to mitigate against an imposition of death. [FN220] In contrast to the government's responsibility to include the aggravating factors in the notice of intent to seek the death penalty, [FN221] the defendant bears no responsibility to notify the government of which mitigating factors the defendant will attempt to prove at the sentencing hearing. [FN222]

Once the government has submitted its aggravating factors and the defendant has submitted its mitigating factors, the two parties will put on an evidentiary case at the sentencing hearing. [FN223] At this phase, the parties will engage in an evidentiary battle. [FN224] The parties will attempt to prove their own factors while disproving their opponent's factors. [FN225] Each party's evidence is ultimately intended to sway the jury on its decision for or against death. [FN226]

4. Rules of Evidence, Procedure, & Burdens of Proof

The Federal Rules of Evidence are completely inapplicable in a sentencing hearing pursuant to the FDPA. [FN227] The FDPA establishes its own rules of evidence. [FN228] At the outset, the government and the defendant may provide any relevant information in regard to the sentencing hearing. [FN229] Elaborating on this general provision, the FDPA specifically allows the government to provide any relevant information as t ***1071** aggravating factors, and the statute also allows the defendant to provide any relevant information as to mitigating factors. [FN230] Relevant information can be excluded under the FDPA only if its "probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." [FN231]

Thus, while the Federal Rules of Evidence do not govern the sentencing hearing, the district court's ability to exclude relevant evidence is akin to the standard outlined in Rule 403 of the Federal Rules of Evidence. [FN232] However, the standard enunciated in the FDPA differs quite significantly from the standard of Rule 403 due to the exclusion of "substantially" from the version codified in the FDPA. [FN233] Rule 403 requires the probative value to be "substantially outweighed" by the danger of unfair prejudice. [FN234] As the Drug Kingpin Act basically re-codified the language of Rule 403, the Drug Kingpin Act's exclusionary standard also required "substantial" outweighing. [FN235] In contrast, the standard enunciated in the FDPA requires only that the probative value be "outweighed" by the danger of unfair prejudice. [FN236] Therefore, the FDPA's standard seems to allow a greater chance for evidence to be excluded based on unfair prejudice, confusing the issues, or misleading the jury. [FN237]

The procedure and burden of proof for the sentencing hearing is similar to a trial. The FDPA provides that the government begins the argument, and the defendant replies. [FN238] The government then rebuts. [FN239] Moreover, the government and the defendant will be permitted to rebut any information given at the sentencing hearing, and the government and defendant will be given "fair opportunity" to develop their arguments concerning the aggravating and mitigating factors. [FN240]

In addition, the FDPA logically allocates the burden of proof over aggravating and mitigating factors to the party who has the greatest interest in each factor. The government carries the burden of proof for the aggravating factors, and the defendant carries the burden of proof for the mitigating factors. [FN241] The FDPA makes a crucial distinction between the burden of proof required for the government and the burden the defendar ***1072** must carry. [FN242] While the defendant is only required to establish the mitigating factors by a preponderance of the evidence as to any one juror, the government is required to establish each aggravating factor beyond a reasonable doubt as to all of the jurors. [FN243]

At the close of the sentencing hearing, the jury is faced with the decision of whether or not to vote for a sentence of death. [FN244] If the jury finds at least one aggravating factor from each of the two separate lists of statutory aggravating factors, the narrowing function required by Furman is satisfied. [FN245] In addition, because the FDPA requires that the jury be directed to both the circumstances of the crime as well as the characteristics and record of the defendant, through the presentation of aggravating and mitigating factors, the requirement of an "individualized sentence" is also satisfied. [FN246] After the evidence is presented by the parties at the sentencing hearing, the jury will be asked to weigh the evidence and decide whether the defendant should be put to death. [FN247]

D. Weighing in on Death

As far as death penalty statutes are concerned, the FDPA is considered a weighing statute. [FN248] This means that jurors are required to weigh the aggravating and the mitigating factors. [FN249] In addition, the weighing scheme of the FDPA is an individual weighing performed separately by each juror. [FN250] Further, the FDPA allows an individual determination as to mitigating factors, but requires a unanimous determination as to aggravating factors. [FN251]

Consequently, under the FDPA's statutory scheme, each juror must weigh the aggravating factors found beyond a reasonable doubt by a unanimous decision of the jury against the mitigating factors he or she found to exist by a

preponderance of the evidence. [FN252] Although the jurors are required to record their votes with respect to each aggravating and mitigating factor as special findings of the jury, [FN253] this procedure seems to be more for ***1073** form than for substance. Because each juror weighs different mitigating factors against the aggravating factors found by the jury as a whole, [FN254] the jury's decision is really the result of twelve independent viewpoints being coalesced together after an individual weighing of aggravating and mitigating factors. [FN255]

Although each juror is allowed to disregard the other jurors' findings when making a decision, [FN256] the FDPA represents a marked improvement over the Drug Kingpin Act. The Drug Kingpin Act contains a clause resembling an escape hatch for the jury. [FN257] The clause effectively allows the jury to disregard all of its determinations with regard to the aggravating and mitigating factors and refuse to impose a sentence of death. [FN258] The Drug Kingpin Act, therefore, allows the jury to make an independent, unfettered decision despite the Act's detailed procedures. [FN259] Seemingly weary of the possible problems of "arbitrary and capricious" imposition of the death penalty due to this clause's vesting of unfettered discretion with the jury, Congress excluded this language from the FDPA. [FN260] Nonetheless, the FDPA still allows each juror to individually weigh the aggravating and mitigating factors; therefore, the FDPA provides almost as much discretion as the Drug Kingpin Act.

While the FDPA is a weighing statute, it is not a quantitative weighing statute. [FN261] Jurors are not forced to vote for death if the number of aggravating factors is greater than the number of mitigating factors. [FN262] Practically speaking, however, piling up the factors on one side of the scale could influence the jury's decision. [FN263] Jurors might impliedly assess some quantitative level to each factor when performing the weighing. [FN264]

***1074** The accumulation of factors on either side of the equation can only serve to tip the scales of justice to the more heavily weighted side. [FN265] If the aggravating factors outweigh the mitigating factors, the defendant is likely to challenge the aggravating factors as vague or duplicative in an effort to show skewing of the weighing process. [FN266] If the appellate court finds an invalid aggravating factor(s), that court must decide how to address the improper balance created by the invalid aggravating factor(s). Concerning the type of review to employ and whether reversal and remand is warranted, a strong polar division exists between the Tenth Circuit and Fourth Circuit. [FN267]

1. Tenth Circuit, United States v. McCullah: Reweighing at the Trial Level

In United States v. McCullah, the United States Court of Appeals for the Tenth Circuit decided that duplication and/or overlapping of aggravating factors warranted a reversal and remand. [FN268] In the decision, the Tenth Circuit found that overlapping of aggravating factors occurred in two separate instances. [FN269] In the first instance, a statutory aggravating factor and a non-statutory aggravating factor were found to be duplicative. [FN270] In the second instance, two statutory aggravating factors were found to be duplicative. [FN271] The statutory aggravating factor at section 848(n)(1)(C), that the defendant " 'intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim which resulted in death of the victim,"' was common to both instances. [FN272]

In the first instance, section 848(n)(1)(C) was overlapped with a non- statutory aggravating factor that simply stated that the defendant had " 'committed the offenses as to which he [was] charged in the indictment.' " [FN273] Because the offense charged in the indictment required a finding that the defendant be a person who "did intentionally kill . . . or counsel, command, induce, procure, or cause the intentional killing of an individual, and such killing did result," the two factors were found to be too duplicative. [FN274] Therefore, the court held that unconstitutional overlapping and duplication resulted from the prosecutor's creation of a non- statutory aggravating factor ***1075** that was almost identical to an aggravating factor provided by Congress. [FN275]

In the second instance, section 848(n)(1)(C) was overlapped with another statutory aggravating factor from the same section of the Drug Kingpin Act- section 848(n)(1). [FN276] Section 848(n)(1)(D) provides that the

defendant "intentionally engaged in conduct which . . . the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; . . . and resulted in the death of the victim." [FN277] The Tenth Circuit found the use of both sections 848(n)(1)(C) and 848(n)(1)(D) to be duplicative, even though it noted that they were not absolutely identical. [FN278]

The Tenth Circuit relied on the Supreme Court opinion in Stringer v. Black for the proposition that overlapping and duplication created a double counting effect. [FN279] The court also relied on Stringer for the proposition that under a weighing scheme, like the schemes in the Drug Kingpin Act and the FDPA, double counting "create[d] the risk that the death sentence [would] be imposed arbitrarily and thus, unconstitutionally." [FN280] While the Tenth Circuit realized that the Drug Kingpin Act's weighing scheme did not require the jury to find for death if the number of aggravating factors outweighed the number of mitigating factors, the court still found that a qualitative value was implicitly placed on each factor by the jury. [FN281] The court stated, "When the sentencing body is asked to weigh a factor twice in its decision, a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.' " [FN282]

Finally, the Tenth Circuit concluded that reversal and remand was necessary in order to allow a new jury to reweigh the aggravating factors with the mitigating factors. [FN283] Stringer provided that the appellate court could either use harmless-error analysis, reweigh the factors itself, or allow the trial court to reweigh the factors. [FN284] The Tenth Circuit concluded that the overlapping and duplication required reweighing, and remanded the case-implying that the reweighing was best suited to the trial court level. [FN285] The Tenth Circuit's approach in McCullah is starkly contrasted with the approach of the Fourth Circuit in United States v. Tipton.

***1076** 2. Fourth Circuit, United States v. Tipton: Harmless Error Review

Five months after the decision in McCullah, the United States Court of Appeals for the Fourth Circuit faced a similar challenge. [FN286] In United States v. Tipton, three petitioners raised challenges to the imposition of their death sentences pursuant to the Drug Kingpin Act. [FN287] The petitioners' challenges revolved around the constitutional validity of four statutory aggravating factors located at section 848(n)(1) of the Drug Kingpin Act-some of the same statutory aggravating factors at issue in McCullah. [FN288] Addressing the defendants' challenge of overlapping and duplicative statutory aggravating factors, the Fourth Circuit found error but did not reverse or remand because the Fourth Circuit found the error to be harmless. [FN289]

The district court allowed the jury to choose more than one of the four factors in section 848(n)(1). [FN290] The jury did, in fact, find all four of the factors listed in section 848(n)(1). [FN291] The Fourth Circuit concluded that Congress did not intend for all four of the factors in section 848(n)(1) to be found at the same time. [FN292] Therefore, the Fourth Circuit held that the district court erred in allowing the jury to choose more than one of the factors in section 848(n)(1). [FN293]

Like the Tenth Circuit in McCullah, the Fourth Circuit relied on Stringer for the proposition that overlapping and duplication runs a risk of skewing the weighing process in favor of the death penalty. [FN294] Initially acknowledging that the Tenth Circuit in McCullah correctly held that error had resulted from the duplicative factors, the Fourth Circuit criticized the Tenth Circuit's opinion for not conducting harmless error review as Stringer allowed. [FN295] The court found guidance in the Supreme Court's standard for harmless error review ***1077** enunciated in Clemons v. Mississippi. [FN296] The Clemons standard provided that the court could find "harmlessness" in the error if convinced that the jury would have recommended the same sentence of death absent the erroneous instruction of the district court. [FN297]

Employing the harmless error review of Clemons, the Fourth Circuit found the district court's erroneous instructions to be harmless. [FN298] Initially, the Fourth Circuit deduced that the jury's finding of all four sub-factors in section 848(n)(1) necessarily meant that the jury relied most on the factor with the highest moral culpability-section 848(n)(1)(A)-that the defendant "intentionally killed the victim." [FN299] Next, the court hypothesized that had the jury been properly instructed, it would have relied on section 848(n)(1)(A) as the sole

basis for its section 848(n)(1) threshold finding. [FN300] Finally, the court concluded that the jury would not have afforded the one factor any less weight than the four factors were afforded together. [FN301]

In making this final jump, the Fourth Circuit proposed several reasons for concluding that the error was harmless. [FN302] First, the court felt that the factor in section 848(n)(1)(A) necessarily subsumed the other three factors in section 848(n)(1) because it represented the highest degree of moral culpability. [FN303] The district court's jury instructions provided the Fourth Circuit with another reason to conclude that the error was harmless. [FN304] The court found that the district court's instructions properly informed the jury that no quantitative value should be assessed to individual factors. [FN305] Further, the Fourth Circuit found that the instructions properly informed the jury that the three other factors in section 848(n)(1) were "lesser-included" factors of the factor in section 848(n)(1)(A). [FN306]

The final and most important reason the Fourth Circuit found harmless error was that the jury actually distinguished between the moral culpability of the defendants when recommending sentences of death. [FN307] At the trial and sentencing hearing, the jury heard facts regarding a broad conspiracy among numerous defendants, but the jury only imposed a death sentence for those ***1078** defendants either found to be the "actual killer or . . . physically present as an active participant in the killing." [FN308] Therefore, the Fourth Circuit found that "whatever misapprehensions the jury may have received from the court's allowance of cumulative findings of [848(n)(1)] circumstances, the jury properly accorded the weight it should have to the [848(n)(1)(A)] circumstance." [FN309]

The Fourth Circuit's analysis here was partially flawed. The fact that the jury actually recommended death for only those defendants who were, in the eyes of the Fourth Circuit, the most morally culpable of the group of defendants does not somehow preclude the possibility that the jury allocated too much weight to the three extra statutory aggravating factors when it recommended the death sentence for those defendants. Arguably, the Fourth Circuit in Tipton placed more emphasis on the defendant's moral culpability and less emphasis on the improper inclusion of extra aggravating factors in the jury's weighing process. Irrespective of whether the Fourth Circuit's opinion is flawed, the Fourth Circuit's opinion in Tipton, finding harmless error, is directly in contrast with the error analysis performed by the Tenth Circuit in McCullah, finding error, and reversing and remanding for reweighing at the trial court level.

E. The Decision

Although the jurors individually weigh the aggravating factors against the mitigating factors, the FDPA requires the jury-as a whole-to make the final determination of whether to impose a sentence of death. [FN310] The jury can vote for death, life imprisonment without parole, or some other lesser sentence authorized by law. [FN311] The FDPA requires the jury's vote to be unanimous. [FN312] If the jury votes for death or life imprisonment, the court is required to impose the sentence accordingly. [FN313] Furthermore, if the jury votes for "some other lesser sentence," the FDPA thereby authorizes the judge to sentence the defendant to some other sentence in accordance with federal sentencing guidelines. [FN314]

***1079** The FDPA empowers the jury with more sentencing power than is available to a jury under the Drug Kingpin Act. [FN315] The Drug Kingpin Act merely authorizes the jury to vote for or against a sentence of death. [FN316] In contrast, the FDPA allows the jury, by unanimous vote, to vote for a sentence of death, life imprisonment without parole, or some other lesser sentence. [FN317] Like the FDPA, however, the Drug Kingpin Act also requires the jury to be unanimous in a decision of death, and it mandates that the district court impose a sentence of death upon such a vote. [FN318]

The Drug Kingpin Act seems to automatically authorize the district court judge to impose some other sentence if the jury could not reach a unanimous decision on death. [FN319] In contrast, if a jury cannot reach a unanimous decision on death, the FDPA allows the jury to reach a unanimous decision for either life imprisonment without parole or some other lesser sentence. [FN320] According to the language of the FDPA, it still seems that a district

court judge may impose a lesser sentence if the jury cannot reach a unanimous decision. [FN321]

Up to this point, the jury has heard the evidence at the sentencing hearing, weighed the aggravating and mitigating factors, and rendered a verdict. [FN322] If the jury recommended death, then the judge was bound to impose a sentence of death. [FN323] At this point, the defendant begins a battle for his life.

F. Review of a Sentence of Death

If the jury recommends a sentence of death, the defendant is entitled to review of the sentence in accordance with the provisions of section 3595 of the FDPA. [FN324] The FDPA provides for review upon appeal by the defendant. [FN325] *1080 While the FDPA does not provide an automatic appeal like the Georgia death penalty scheme in Gregg, the Supreme Court has never required an automatic appeal; rather, the Supreme Court only requires "meaningful appellate review." [FN326] To this end, the FDPA requires the appellate court to look at the entire record upon review [FN327] and to address "all substantive and procedural issues raised on the appeal." [FN328]

The appellate court may reverse and remand the sentence of death for reconsideration by another jury, or the court could reverse and render for a sentence other than death. [FN329] The appellate court may reverse a death sentence upon a finding that the "sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." [FN330] An appellate court may also reverse upon a finding that the "admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor," [FN331] or upon a finding that the "proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." [FN332]

While the FDPA mandates that the appellate court reverse the sentence of death when one of the above factors is present, the FDPA does not allow relief if the error can be considered harmless beyond a reasonable doubt. [FN333] In addition, the FDPA does not provide for proportionality review like the Georgia death penalty statute at issue in Gregg. [FN334] The lack of proportionality review is especially troubling when considering the fact that the jury has the ultimate discretion to impose the death penalty. [FN335] Although it is theoretically possible under the FDPA for the district court to act in the role of decision-maker at the sentencing hearing, the court is usually bound by the jury's *1081 determination of death. [FN336] The complete vesting of authority in the jury may, in turn, require a form of proportionality review in order to minimize the arbitrary imposition of the death penalty. [FN337] However, the FDPA embodies no commitment to proportionality review. [FN338]

G. Appeals Under the FDPA

There are currently thirteen prisoners on federal death row, five pursuant to the Drug Kingpin Act and eight pursuant to the FDPA. [FN339] Many of the cases under the FDPA are currently on appeal, most notably, the case of United States v. McVeigh in the Fourth Circuit. [FN340] Because of overwhelming public interest in the McVeigh case, the district court for Colorado, under the direction of Judge Matsch, has given careful, considered review to all issues raised in pre-trial motions and to the decisions rendered during the trial and sentencing hearing. [FN341] Due to the unusual publicity of this case, the Fourth Circuit will probably also closely scrutinize the McVeigh appeal. In fact, many commentators have already proclaimed that McVeigh will be the benchmark for the federal death penalty. [FN342] Until that point, however, federal death penalty jurisprudence has United States v. Jones. [FN343]

*1082 IV. United States v. Jones

On February 18, 1995, Louis Jones, Jr. forcibly abducted Private Tracie Joy McBride at gunpoint from a laundry room at Goodfellow Air Force Base in San Angelo, Texas, injuring Private Michael Alan Peacock in the process. [FN344] According to the defendant, "On that day, the demons he had suppressed throughout his life overwhelmed [him], leading to tragic consequences." [FN345] Jones sexually assaulted and killed McBride,

depositing her body under a bridge located twenty minutes outside of San Angelo. [FN346]

On March 1, 1995, Louis Jones's ex-wife Sandra Lane informed Air Force investigators she had been attacked by Jones only two days before McBride's abduction. [FN347] The investigators convinced Sandra to file a complaint, and the San Angelo Police took a sworn statement. [FN348] An arrest warrant was issued for Jones, and Jones was arrested. [FN349] While in custody for the assault and abduction of Sandy, Jones was questioned regarding McBride's abduction. [FN350] In response to questioning by Air Force investigators, Jones gave a written statement admitting to the abduction and murder. [FN351] Jones subsequently led the authorities to McBride's body. [FN352]

On March 7, 1995, Jones was indicted on the following two counts: "1) kidnapping within the special maritime and territorial jurisdiction of the United States, resulting in the death of Tracie Joy McBride, in violation of [18 U.S.C. § 1201(a)(2) (1994)], and 2) assault of Michael Alan Peacock within the maritime and territorial jurisdiction of the United States, resulting in serious bodily injury, in violation of [18 U.S.C § 113(f) (1994)]." [FN353] In the fall of 1995, the defendant was tried and convicted of capital murder before the Honorable Sam R. Cummings in a federal district court in Lubbock, Texas. [FN354]

*1083 At the sentencing hearing, the jury quickly passed the threshold test of intent by finding two of the four statutory aggravating factors in section 3591(a). [FN355] The government then submitted the seven aggravating factors that it had included in its notice of intent to seek the death penalty. [FN356] Of the seven factors, the government submitted four statutory aggravating factors from the list in section 3592(c), and the jury found two of these factors unanimously and beyond a reasonable doubt. [FN357] The government also submitted three non-statutory aggravating factors, and the jury found two of those factors by unanimous vote and beyond a reasonable doubt. [FN358] In addition, eleven mitigating factors were found by at least one of the jurors. [FN359] On November 3, 1995, after weighing the four aggravating factors against the eleven mitigating factors, the jury returned a unanimous verdict recommending death, and the district court entered judgment accordingly. [FN360] The United States Court of Appeals for the Fifth Circuit, after considering the defendant's challenges raised on appeal, affirmed both the defendant's conviction and his death sentence. [FN361]

*1084 United States v. Jones, the first case challenging the FDPA to reach a federal appeals court, dramatically impacts federal death penalty law. [FN362] The case represents a revealing window into the FDPA and provides an excellent litmus test for federal death penalty jurisprudence. [FN363] Nearly all of the defendant's challenges in Jones contained the base allegation that something-the basis of the challenge-resulted in an "arbitrary and capricious" imposition of the death penalty in violation of the "cruel and unusual punishment clause" of the Eighth Amendment as applied in Furman. [FN364] However, Jones is best analyzed by dividing those challenges into the following two arenas: (1) Constitutional Challenges-challenges alleging that certain procedures of the FDPA result in an arbitrary and capricious imposition of the death penalty, and (2) Error Challenges-challenges alleging that district court errors and abuse of discretion led to an arbitrary and capricious imposition of the death penalty.

A. Constitutional Challenges

As with most death penalty appeals involving a statute, the Fifth Circuit's opinion in United States v. Jones began with facial challenges to the constitutional validity of the FDPA. [FN365] These constitutional challenges included a challenge to the broad use of prosecutorial discretion in creating non-statutory aggravating factors, the lack of proportionality review, and the relaxed evidentiary standard in the presentation of evidence at the sentencing hearing. [FN366] These challenges are some of the most pervasive constitutional challenges to both the Drug Kingpin Act and the FDPA; however, the challenges have been uniformly struck down. [FN367]

1. Prosecutor's Discretion

In a de novo review of the statute, the Fifth Circuit held that the *1085 prosecutor's creation of non-statutory aggravating factors was not an unconstitutional delegation of legislative power. [FN368] The Fifth Circuit initially investigated the origins and principles of the non-delegation doctrine. [FN369] The court explained that

the doctrine prohibits Congress from delegating its legislative power to another branch of government unless Congress formulates an "intelligible principle" to guide the delegatee's use of the legislative power. [FN370] The Fifth Circuit found that the FDPA contained sufficient "intelligible principles." [FN371] To begin, the court noted that the prosecutor has historically been allowed broad discretion to decide which crimes to prosecute, and the FDPA simply continued the tradition of investing such discretion with the prosecutor. [FN372]

Next, the Fifth Circuit highlighted four limitations on the prosecutor's discretion which served to guide the prosecutor's power. [FN373] First, the FDPA requires the prosecutor to give notice prior to trial. [FN374] Second, the prosecutor is guided by death penalty jurisprudence of the Supreme Court. [FN375] Third, the district court limits the prosecutor's discretion by limiting the admission of irrelevant and prejudicial evidence. [FN376] Fourth, the prosecutor's discretion is further limited by the need for the jury to find at least one statutory aggravating factor before even considering the non- statutory aggravating factors. [FN377]

Consequently, the Fifth Circuit joined the ranks of other federal courts who have held that a prosecutor's discretion to create nonstatutory aggravating factors under the FDPA does not violate the nondelegation doctrine. [FN378] Although the Supreme Court has not directly ruled on this issue with respect to the FDPA, the Supreme Court has upheld non-statutory aggravating factors in state schemes. [FN379] The defendant also challenged the *1086 FDPA's lack of proportionality review and relaxed evidentiary standard at the sentencing hearing. [FN380]

2. Lack of Proportionality Review

Holding that the Supreme Court has never mandated proportionality review, the Fifth Circuit focused on the FDPA's numerous other procedures which complied with the Supreme Court mandate against arbitrariness. [FN381] Although some commentators have argued that Gregg embodies a commitment to proportionality review, [FN382] the Fifth Circuit relied on more recent Supreme Court precedent to conclude that proportionality review is not mandatory. [FN383] The Fifth Circuit held that the FDPA's other procedures adequately guarded against the arbitrary imposition of the death penalty. [FN384] Despite the additional safeguards against arbitrary imposition, commentators have argued that different juries will make vastly different decisions; therefore, some form of proportionality review is still necessary in order to comply with the requirements of Furman. [FN385] Nonetheless, according to the Fifth Circuit, the FDPA's lack of proportionality review does not render the statute unconstitutional. [FN386]

3. Relaxed Evidentiary Standard at Sentencing Hearing

In turn, the Fifth Circuit rejected the defendant's challenge to the FDPA's relaxed evidentiary standard. [FN387] The defendant argued that the evidentiary standard was prejudicial. [FN388] However, the Fifth Circuit found that the relaxed evidentiary standard did not prejudice the defendant, but actually "help[ed] to accomplish the individualized sentencing required by the constitution." [FN389] By allowing the jury to have as much information as possible, the FDPA focuses the jury's attention on the individual defendant's character and criminal record. [FN390] Although most relevant information will be heard by the jury, the judge can still exclude prejudicial information at the sentencing hearing. [FN391] Therefore, the Fifth Circuit held that the relaxed *1087 evidentiary standard at the sentencing hearing does not violate the Constitution. [FN392]

B. Error Challenges

The error challenges raised by the defendant in Jones include challenges to the aggravating factors and challenges alleging confusion of the jury. [FN393]

1. Aggravating Factors

The defendant challenged the statutory aggravating factors for failing to narrow the discretion of the jury and for improper vagueness. [FN394] In turn, the defendant challenged the non-statutory aggravating factors for improper

vagueness, over breadth, and duplication. [FN395]

a. Statutory Aggravating Factors

The defendant challenged the use of two statutory aggravating factors found by the jury. [FN396] The challenged factors provided: (1) "The defendant Louis Jones caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping," [FN397] and (2) "The defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." [FN398] The Fifth Circuit found no reversible as to either factor. [FN399]

At the outset, the Fifth Circuit conceded that death penalty jurisprudence requires a capital punishment scheme to provide a mechanism for narrowing the class of defendants eligible for death [FN400] because the jury must be allowed to consider the circumstances of the crime before imposing the death penalty. [FN401] The court pointed out that death penalty schemes can either narrow *1088 the class of defendants at the trial stage or at the penalty stage, [FN402] and the FDPA's form of narrowing followed the latter approach by using aggravating factors at the sentencing hearing. [FN403]

The defendant alleged that the first factor failed to narrow the jury's discretion because it merely repeated the elements of the crime which had already served to narrow the jury's discretion. [FN404] The court relied on Supreme Court jurisprudence for the proposition that aggravating factors, even aggravating factors that simply repeat the elements of the crime, adequately meet the narrowing requirement as long as the aggravating factors actually serve to narrow the jury's discretion. [FN405]

Scrutinizing the aggravating factor, the Fifth Circuit found that despite the statutory aggravating factor's repetition of the substantive crime of kidnapping, the aggravating factor's "causal" requirement did in fact serve to additionally narrow the jury's discretion. [FN406] The court emphasized that a jury could find a defendant guilty of the crime of kidnapping with death resulting under section 1201 and still not find that the defendant "caused" the death. [FN407] Because the federal crime of kidnapping with death resulting under section 1201 [FN408] did not require that the defendant intend to kill the victim, the Fifth Circuit concluded that the first statutory aggravating factor's requirement of intention went beyond the mere elements of the crime. [FN409] Therefore, the court concluded that the statutory aggravating factor performed a narrowing function independent of a guilty verdict for the crime of kidnapping under the Federal Kidnapping Act. [FN410]

Continuing his challenges, the defendant alleged that the second aggravating factor found by the jury was unconstitutionally vague. [FN411] The defendant challenged the vagueness of the aggravating factor as failing to adequately inform the jury and leaving the decision to the arbitrary discretion of the jurors in violation of the requirements of Furman and the Eighth Amendment. [FN412] Relying on Fifth Circuit precedent, the court initially noted *1089 that challenges as to vagueness are reviewed with great deference for the statute in question. [FN413]

Employing a deferential review, the Fifth Circuit found that the second aggravating factor was not unconstitutionally vague. [FN414] First, the court noted that although the "heinous, cruel, and depraved" language alone would have been unconstitutionally vague, the statute adequately remedied the vagueness by requiring the offense to involve torture or physical abuse. [FN415] Second, the district court had defined each term with great detail. [FN416] Third, and most important to the Fifth Circuit, the aggravating factor had a "common-sense core meaning" that the jury was capable of understanding. [FN417] After rejecting both of the defendant's challenges to the statutory aggravating factors, the Fifth Circuit turned its focus to the defendant's more meritorious challenges to the non-statutory aggravating factors.

b. Non-Statutory Aggravating Factors

The defendant in Jones challenged the two non-statutory aggravating factors as being unconstitutionally vague, overbroad, and duplicative. [FN418] The two non-statutory aggravating factors found to be established beyond a reasonable doubt by a unanimous jury were: (1) "Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas,"and (2) "Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family." [FN419] The Fifth Circuit viewed "personal characteristics" as overlapping "young age, slight stature, background, and unfamiliarity." [FN420] Consequently, the Fifth Circuit found that the district court erred by submitting the duplicative aggravating factors to the jury. [FN421]

i. Finding Error

In finding error in the duplicative factors, the Fifth Circuit cited to McCullah for the proposition that "[s]uch double counting of aggravating *1090 factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." [FN422] The Fifth Circuit recognized that Stringer prohibited the court from assuming that it would not have made a difference if the "thumb had been removed from death's side of the scale," especially in a weighing scheme, where aggravating factors lie at the heart of the jury's final decision regarding the imposition of death. [FN423] As a result, the district court's submission of duplicative aggravating factors was deemed to be error. [FN424]

The Fifth Circuit also concluded that the factors were invalid on the basis of the vagueness challenge. [FN425] Relying on the Supreme Court's standard for evaluation of vagueness challenges to aggravating circumstances in death penalty statutes, [FN426] the Fifth Circuit found that the two non-statutory aggravating factors failed to guide the jury's discretion or narrow the class of death eligible defendants. [FN427] The Fifth Circuit emphasized the lack of clarification by the district court's instructions with respect to "background," "personal characteristics," or "unfamiliarity with San Angelo." [FN428] In complete contrast to the district court's methodical clarification of the definitions of certain terms in the statutory aggravating factors, [FN429] the district court completely failed to clarify, define, or explain the non-statutory aggravating factors. [FN430] Because of the vagueness of the non- statutory aggravating factors, the Fifth Circuit concluded that the jury was allowed open-ended discretion in violation of the requirements of Furman. [FN431]

ii. Choosing a Standard of Review

After finding that the non-statutory aggravating factors were invalid because of both duplication and vagueness, the Fifth Circuit looked to precedent for guidance as to whether to reverse and remand or allow the death *1091 sentence to stand. [FN432] Like the Tenth Circuit in McCullah, [FN433] the Fifth Circuit relied on Stringer [FN434] in concluding that an appellate court must closely scrutinize the role of any invalid aggravating factor in the jury's decision to impose death. [FN435] However, unlike the Tenth Circuit, the Fifth Circuit only perceived two available options for reviewing the validity of the death sentence under the invalid aggravating factors. [FN436] The court relied on the Supreme Court's 1990 holding in Clemons v. Mississippi as authority to either reweigh the aggravating factors against the mitigating factors or to apply harmless error review. [FN437]

By relying solely on Clemons, the Fifth Circuit ignored the third option available to an appellate court according to the Supreme Court's 1992 holding in Stringer. [FN438] According to Stringer, "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." [FN439] Therein, the Supreme Court authorized three options: (1) harmless error analysis, (2) re-weighing at the appellate level, or (3) re-weighing at the trial level. [FN440] The third option allows appellate courts faced with invalid aggravating factors to simply reverse and remand the case for re-weighing by a new jury at the trial level. [FN441] The Supreme Court also emphasized the possibility of a requirement "that when the weighing process has been infected with a vague factor[,] the death sentence must be invalidated." [FN442] The Tenth Circuit followed this third approach in McCullah and reversed and remanded for a reweighing at the trial court level. [FN443] The Tenth Circuit

arguably followed the best option because it refrained from super-imposing its own decision for the jury's decision on the basis of mere speculation as to how the jury would have decided the case under the new circumstances. [FN444]

*1092 iii. Review Under Harmless Error Analysis]cm

Upon consideration of its options, the Fifth Circuit, like the Fourth Circuit in Tipton, [FN445] chose to employ a form of harmless error review. [FN446] The Fifth Circuit first noted the varied options available to an appellate court when choosing which form of review to employ. [FN447] The court acknowledged that it could reweigh the factors itself by determining what the jury would have decided in the absence of any invalid aggravating factors. [FN448] Alternatively, the court noted that both Stringer and Clemons authorized it to use a form of harmless error review. [FN449] According to Clemons, two forms of harmless error review were available to the Fifth Circuit. [FN450] Under the first option, the Fifth Circuit could have "inquire[d] into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor[s] been properly defined in the jury instructions." [FN451] Under the second option, the Fifth Circuit could "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor[s]." [FN452]

Employing the second authorized form of harmless error review, the Fifth Circuit concluded that the jury would have imposed the death sentence even without the two invalid non-statutory aggravating factors; thereby, the Fifth Circuit found the error harmless. [FN453] By first removing the two non- statutory aggravating factors from the mix, the Fifth Circuit was left with only two statutory aggravating factors to weigh against the eleven mitigating factors. [FN454] In an effort to disclaim any jury reliance on the two non- statutory factors, the Fifth Circuit pointed to the government's great emphasis on the two statutory aggravating factors and the requirement that the jury must find at least one of the statutory aggravating factors before imposing *1093 sentence of death. [FN455] By way of contrast, the Fifth Circuit asserted that the jury was not required to find any non-statutory aggravating factors before imposing a sentence of death. [FN456] Finally, the Fifth Circuit concluded its review abruptly by stating only that "the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." [FN457] This cursory analysis presumably satisfied the Fifth Circuit's harmless error review. [FN458]

iv. Lack of "Scrutiny" and "Thorough Analysis"

While Clemons and Stringer authorized the Fifth Circuit to employ a form of harmless error review, Stringer required the Fifth Circuit to scrutinize the effect of the invalid aggravating factor(s) on the jury's decision. [FN459] Specifically, the Court in Stringer required appellate courts to perform a "thorough analysis of the role an invalid aggravating factor played in the sentencing process" before affirming a death sentence. [FN460] The Fourth Circuit employed the same form of harmless error review in United States v. Tipton. [FN461] The Fourth Circuit's opinion indicates a thorough analysis of the role of the invalid aggravating factors and a high degree of scrutiny over the effect of the invalid aggravating factors. [FN462] Although the Fourth Circuit's opinion can be criticized for merely second-guessing what the jury would have done under the new circumstances, [FN463] the Fourth Circuit's opinion at least gave a detailed explanation of its analysis and conclusion. [FN464] Here, the Fifth Circuit applied a very loose interpretation to the Supreme Court's requirements of "scrutiny" and "thorough analysis."

The Fifth Circuit's analysis and "scrutiny" were sparse and hardly related to an examination of the role of the invalid non-statutory aggravating factors. In making its decision, the Fifth Circuit mainly relied on the FDPA's requirement that the jury must find a statutory aggravating factor, coupled with the fact that the jury was not required to find non-statutory aggravating factor(s) in order to impose a sentence of death. [FN465] Thereby, the Fifth Circuit relied only on the statutory structure of the FDPA. If the Fifth Circuit's reliance on the structure of the FDPA satisfies the requirement of "thorough analysis of the role an invalid aggravating factor played in the sentencing process," [FN466] then the Supreme Court's "scrutiny" and "thorough analysis *1094 requirements

have been effectively emasculated. Under such an analysis, any invalid non-statutory aggravating factor could be discounted by simply referencing the FDPA's emphasis on statutory aggravating factors as opposed to non-statutory aggravating factors. The Supreme Court must have envisioned greater scrutiny and analysis of the invalid non-statutory aggravating factor's role than merely referencing the statutory death penalty scheme. [FN467]

To bolster its decision, the Fifth Circuit also relied on the government's strong emphasis on the statutory aggravating factors. [FN468] By pointing to the government's great emphasis on the statutory aggravating factors, the Fifth Circuit implied that the government placed very little emphasis on the non-statutory aggravating factors. [FN469] However, the Fifth Circuit failed to adequately link the government's lack of emphasis on the non-statutory aggravating factors to the jury's lack of emphasis on the non- statutory aggravating factors. Moreover, the Fifth Circuit failed to explain why the government would introduce non-statutory aggravating factors if the factors would not be emphasized. Arguably, the government wanted to increase the quantity of aggravating factors, knowing that the "mere finding of an aggravating factor [would] imply a qualitative value to that factor." [FN470] Further, the Fifth Circuit never addressed the possibility that the two invalid non-statutory aggravating factors were given an implicit quantitative value by the jury. [FN471] Consequently, the Fifth Circuit's naked reliance on the structure of the FDPA and the small emphasis placed on the non-statutory aggravating factors arguably violates Supreme Court precedent by "assum[ing] it would have made no difference if the thumb had been removed from death's side of the scale." [FN472]

*1095 2. Jury Instructions

In Jones, the defendant challenged the jury instructions on two main grounds: (1) the failure to include the defendant's requested jury instructions, and (2) confusion resulting from the jury instructions which were actually given. [FN473]

Before addressing the defendant's complaints of error, the Fifth Circuit established the standards to be used in reviewing each challenge. [FN474] The court determined that the challenge to the district court's refusal to include the defendant's requested jury instructions would be reviewed underan abuse of discretion standard. [FN475] The Fifth Circuit next determined that the challenges to the district court's use of jury instructions resulting in jury confusion would be reviewed under either abuse of discretion or plain error, depending on whether the defendant objected below. [FN476] If the defendant objected below and thereby preserved the error, the Fifth Circuit would review under an abuse of discretion standard. [FN477] However, if the defendant failed to object below, the Fifth Circuit would review only under a plain error standard. [FN478]

Therefore, the failure of defendant's counsel to properly preserve error dramatically altered the review employed by the Fifth Circuit and potentially prejudiced the defendant's ultimate liberty-life. The Fifth Circuit found no reversible error in any of the challenges to the jury instructions, [FN479] but the standard of review employed by the court influenced the outcome as to at least one challenge to the jury instructions. [FN480] The Fifth Circuit reviewed the challenges systematically, beginning with the defendant's challenge to the district court's failure to grant the requested jury instructions. [FN481]

a. Failure to Give Requested Jury Instructions

The Fifth Circuit held that the district court did not abuse its discretion by refusing to give the defendant's requested jury instruction. [FN482] The defendant requested the district court to instruct the jury that a failure to find unanimously for death or life imprisonment without the possibility of release would automatically result in the judge imposing a sentence of life *1096 imprisonment without parole. [FN483] In order to decide if the district court had abused its discretion in refusing to give the defendant's requested jury instruction, the Fifth Circuit tested the requested instruction using a three-prong test: (1) was the requested instruction substantively correct, (2) did the actual jury instructions fail to substantively cover the requested instructions, and (3) did the failure to give the requested instruction greatly prejudice the defendant's case? [FN484] As the prongs of this test were viewed in conjunction, the Fifth Circuit would not reverse unless all three questions were answered affirmatively. [FN485]

Because the Fifth Circuit found the requested jury instructions were not substantively correct-a negative answer to the first prong-the court never reached the other two prongs of the test. [FN486]

With a cursory analysis, the Fifth Circuit concluded that the defendant's requested jury instructions were not substantively correct. [FN487] The court held that the defendant's requested instructions were incorrect because they would have falsely informed the jury that in the case of a non-unanimous jury verdict, the judge would automatically impose a sentence of life without parole. [FN488] To support its conclusion, the Fifth Circuit relied only on the FDPA's requirement that a jury return a unanimous verdict. [FN489] After finding that the jury must give a unanimous vote, the court theorized that in the event of a non-unanimous jury, a second sentencing hearing would have to be held in front of a second jury impaneled for that purpose. [FN490] In support of this claim, the court included only a bare citation to section 3593(b)(2)(B) of the FDPA. [FN491] Section 3593(b)(2)(B) states that a sentencing hearing will be conducted "before a jury impaneled for the purpose of the hearing if- the defendant was convicted after a trial before the court sitting without a jury." [FN492]

The Fifth Circuit's failure to find reversible error is suspect. The Fifth Circuit made two crucial mistakes in its analysis. First, the court failed to analyze the relationship of section 3593(e) and section 3594 of the FDPA. Second, the court relied on section 3593(b)(2)(B) to support its analysis.

*1097 i. Relationship Between Sections 3593(e) and 3594

Because little congressional history exists on legislative intent in enacting the FDPA, [FN493] an analysis of the statute requires a close reading of all the sections. [FN494] Section 3593(e) plainly requires the jury to be unanimous in its recommendation of any sentence. [FN495] In addition, section 3593(e) specifically limits the jury to a sentence of death, life imprisonment without parole, or what amounts to allowing the judge to sentence the defendant. [FN496] This section is easily understood to mean that the jury has three options and must be unanimous in choosing any of those options. [FN497] However, section 3593(e) does not state that if the jury is not unanimous, a new jury is impaneled. [FN498]

While section 3593(e)'s meaning is plain, section 3594 must be closely examined to determine its proper import in deciding whether a non-unanimous jury, in fact, defers to the judge. [FN499] Section 3594 states, in its relevant portion: "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law." [FN500]

While the Fifth Circuit correctly concluded that section 3593(e) of the FDPA requires the jury to be unanimous in any sentence imposed, [FN501] the court failed to even mention the import of section 3594.

The FDPA seems to imply a default to the judge when a jury is not unanimous. [FN502] Although section 3593(e) states, in no uncertain terms, that *1098 "the jury by unanimous vote" shall recommend death, life imprisonment without parole, or some lesser sentence, it fails to even address a situation where a jury cannot reach a unanimous verdict. [FN503] Section 3593(e) should be read together with section 3594 in order to understand the statutory scheme of the FDPA. [FN504]

When these sections are read together, it seems that a non-unanimous jury should give way to the judge's imposition of some sentence less than a death sentence. [FN505] While the court's imposition of death and life imprisonment without the possibility of release is prefaced upon the recommendation of the jury, the court's imposition of any lesser sentence authorized by law is not prefaced upon any such recommendation. [FN506] If the drafters of the statute had intended the judge's imposition of a lesser authorized sentence to be conditioned by a recommendation of the jury, they could have easily drafted that sentence of the statute to indicate their intention. [FN507] If Congress had included "Upon a recommendation under section 3593(e)" before the statute's authorization for the court to impose a lesser sentence, Congress would have clearly and unequivocally conveyed its intent to make a judge's imposition of a lesser sentence contingent only upon such a unanimous

recommendation by the jury. [FN508] However, Congress did not word section 3594 in such a way. [FN509]

Congress may have intended section 3594 to act as a default under all circumstances. [FN510] By preceding the court's authorization to impose a lesser sentence with "otherwise," Congress arguably meant to establish the court's imposition of a lesser authorized sentence as the default in all cases where a jury could not reach a unanimous decision. [FN511] This reading of section 3594 is bolstered by the FDPA itself. [FN512] In three separate instances throughout the *1095 FDPA, the jury can become "hung," in the sense that the jury cannot reach a unanimous decision. First, a hung jury may result from the FDPA's threshold requirement that the jury unanimously find beyond a reasonable doubt at least one factor from the list of four statutory aggravating factors relating to the intent of the defendant. [FN513] Second, a hung jury may result from the FDPA's secondary requirement that the jury unanimously find beyond a reasonable doubt at least one factor from a list of statutory aggravating factors relating to the defendant's particular crime. [FN514] Third, a hung jury may result from the FDPA's requirement that the jury unanimously find for death, life imprisonment without parole, or some other lesser sentence. [FN515]

Examining each of the three instances, it seems apparent that Congress intended section 3594's "otherwise" language to act as a default in all situations where the jury failed to reach a unanimous decision. At least one court has construed a hung jury with respect to the threshold question as requiring the judge to discharge the jury and impose some other sentence authorized by law. [FN516] In addition, the FDPA specifically addresses what happens when a jury cannot reach a unanimous decision as to at least one of the aggravating factors from the statutory list of aggravating factors related to the defendant's particular crime. [FN517] In that instance, the FDPA authorizes the judge to impose any other sentence authorized by law. [FN518] Although Congress specifically provided for the judge to impose a lesser sentence in that instance, the "otherwise" language of section 3594 could have been enough to authorize the judge to impose some other lesser sentence in any event. [FN519] Finally, the use of the "otherwise" language in the FDPA's predecessor statute, the Drug Kingpin Act, authorizes the district court judge to impose any sentence other than death if the jury cannot make a unanimous recommendation as to death. [FN520] The Drug Kingpin Act's "otherwise" languag* *1100 seemingly operated as a default under all circumstances. [FN521] Therefore, the FDPA's "otherwise" language should be construed as a default as well. [FN522]

ii. Section 3593(b)(2)(B)

The Fifth Circuit made its second mistake by relying on only section 3593(b)(2)(B) of the FDPA to bolster its conclusion that a non-unanimous jury would result in a second jury being impaneled to sentence the defendant. [FN523] The court's citation to section 3593(b)(2)(B) is either misplaced or entirely inaccurate. Section 3593(b)(2)(B) states only that a sentencing hearing will be held in front of a jury impaneled specifically for that purpose when "the defendant was convicted after a trial before the court sitting without a jury." [FN524] Alternatively, the court may have incorrectly cited to section 3593(b)(2)(B) when it meant to cite to section 3593(b)(2)(C) which states that a sentencing hearing will be held in front of a jury impaneled specifically for that purpose when "the jury that determined the defendant's guilt was discharged for good cause." [FN525] Even if the court really meant to cite to section 3593(b)(2)(C), the court failed to show that lack of a unanimous jury is "good cause" for dismissal of the jury. If this were truly the case, absurd results could abound, as juries could be repeatedly dismissed for lack of a unanimous decision. Under either circumstance, the court's bare citation to section 3593(b)(2)(B) is less than adequate to justify its conclusion that a new jury is impaneled when a jury is "hung."

iii. Continued Review

In light of the foregoing analysis, the defendant's requested jury instructions were arguably substantively correct. The defendant requested a jury instruction telling the jury that in the event they were not unanimous, the judge would automatically "impose a sentence of life *1101 imprisonment without possibility of release." [FN526] Because section 1201 of the Federal Kidnapping Act provides for only a sentence of death or life imprisonment

without parole, the district court judge in Jones was only authorized to impose a sentence of life imprisonment without parole. [FN527] Therefore, if the jury was not unanimous, the judge should have automatically imposed a sentence of life imprisonment without parole. [FN528] Consequently, the Fifth Circuit was in error by finding that the defendant's requested jury instructions were not substantively correct.

If the Fifth Circuit would have found the defendant's requested jury instructions substantively correct, the court would have continued with its "abuse of discretion" review. [FN529] Continuing this review is enlightening. As the three-prong test is conjunctive, all three prongs must be met before an appellate court can reverse. [FN530] The second prong of the test, requiring that a requested jury instruction not be substantially covered in the actual jury charge, is easily satisfied because the district court's actual jury instructions did not instruct the jury on what would happen if it failed to reach a unanimous decision. [FN531] Furthermore, the third prong, requiring that the refusal to give instructions adversely affect the defendant's case, is overwhelmingly satisfied on the facts of Jones. The requested jury instruction would arguably have allowed any one juror not favoring the death penalty to single-handedly hold the verdict hostage because any non-unanimous verdict (even 11 for death and 1 for life imprisonment) would result in the judge's automatic imposition of life imprisonment without the possibility of release.

By failing to inform the jury of this fact, the district court's failure to give the requested jury instructions seriously impaired the defendant's case. In fact, post-verdict affidavits of two jurors in the Jones case emphatically illustrate this conclusion. [FN532] While these affidavits cannot be viewed as evidence by an appellate court under Federal Rule of Evidence 606(b), they help illustrate the conclusion that the defendant's case was seriously impaired because a reasonable juror could have been confused by this issue-in fact, two reasonable jurors were actually confused. [FN533] In conclusion, the Fifth Circuit failed to properly support its theory and failed to properly explain section 3594's relationship to its theory. Based on the unambiguous language of section 3594, the Fifth Circuit arguably should have reversed and remanded *1102 this case for re-sentencing.

b. Actual Jury Instructions Causing Confusion of the Jury

Turning next to the actual jury instructions issued by the district court, the defendant in Jones raised two points of error concerning the instructions given to the jury. [FN534] First, the defendant alleged that the jury instructions "erroneously led the jury to believe that a 'lesser sentence' than life without the possibility of release or parole was possible." [FN535] Second, the defendant alleged that "the [jury] instructions erroneously told the jury that if they were not unanimous about death or life without release, it would default to the judge to impose 'some other sentence authorized by law'-ie., the 'lesser sentence' mentioned throughout the proceedings." [FN536]

The jury instructions mirrored the language of the FDPA, instructing the jury as to three available sentencing options-death, life imprisonment without release, and some other lesser sentence. [FN537]

i. Lesser Sentence than Life Imprisonment Without Release

The Fifth Circuit found no reversible error in the district court's jury instructions with regard to the repeated references to a 'lesser sentence.' [FN538] Initially, the court plainly recognized that due process required the jury to be informed of all sentencing options. [FN539] The court then established the standard of review as "plain error" because the defendant failed to object to the "lesser sentence" instructions at the district court level. [FN540] Under the plain error standard described in Rule 52(b) of the Federal Rules of Criminal Procedure, *1103 the court tests the error to see if it: (1) is plain, and (2) affected substantial rights. [FN541] Applicable case law has created a three prong test by expanding on the two tests of Rule 52(b) and incorporating a threshold test for error. [FN542] Consequently, the test the Fifth Circuit employed was as follows: "(1) there must be an error, which is defined as a deviation from a legal rule in the absence of a valid waiver; (2) the error must be clear or obvious error under current law; and (3) the error must have been prejudicial or affected the outcome of the district court proceedings." [FN543]

Employing this standard, the Fifth Circuit found that the district court did in fact commit error. [FN544] The court noted that the FDPA acts only as a sentence enhancement provision and cannot provide substantive law. [FN545] Noting that "the substantive criminal statute [took] precedence over the death penalty sentencing provisions," the court looked to the Federal Kidnapping Act, the substantive law under which Jones was convicted, to determine what possible sentences the jury could recommend. [FN546] Under the Federal Kidnapping Act, the defendant could only be sentenced to death or life imprisonment without parole. [FN547] As the district court mirrored the language of section 3593 of the FDPA in the jury instructions, and thereby instructed the jury as to three sentencing options, [FN548] the Fifth Circuit found that the district court committed error. [FN549]

The Fifth Circuit next held that the error was not 'plain.' [FN550] The second step of the plain error analysis asks whether the error was "clear or obvious error under current law." [FN551] Because Jones is the first case concerning the FDPA to reach a United States Court of Appeals, the Fifth Circuit recognized that no case law provided the district court precedential guidance as to which law should control when a substantive criminal statute and the FDPA are in conflict. [FN552] With no other analysis, the Fifth Circuit concluded that the "error was not so obvious, clear, readily apparent, or conspicuous that the judge was derelict by not recognizing the error." [FN553]

***1104** Because the Fifth Circuit failed to find plain error, the court never reached the third prong of the plain error test. Had it reached the third prong, the Fifth Circuit would have surely reversed. The third prong simply requires that the error prejudice the outcome of the sentencing. [FN554] Theoretically, the outcome could have been seriously prejudiced because the jury may have gravitated toward a unanimous verdict in order to avoid the possibility of a lesser sentence being imposed by the judge. [FN555] Although the inclusion of the "lesser sentence" option may not be enough by itself to prove prejudice resulted, it becomes seriously prejudicial when coupled with the defendant's second contention, that the jury was led to believe the judge could impose some lesser sentence if the jury were not unanimous.

ii. Judge's Imposition of a "Lesser Sentence" if Jury is not Unanimous

The defendant challenged the jury instructions by contending that a reasonable juror could have believed that some other sentence could possibly be imposed by the district court judge if the jury was not unanimous in its decision. [FN556] On the other hand, the Fifth Circuit asked whether a juror could believe that some lesser sentence would automatically result if the jury was not unanimous in its decisions. [FN557] Although the difference between the defendant's challenge and the Fifth Circuit's rephrasing is subtle, the Fifth Circuit's rephrasing effectively diminished the likelihood that any reasonable juror would fit the description.

If, on the other hand, the Fifth Circuit had framed the issue as the defendant had requested, the likelihood that a reasonable juror would fit the description would have greatly expanded. As an affirmative answer to either phrasing of the issue would prove that error occurred, the Fifth Circuit's rephrasing of the issue unnecessarily heightened the defendant's burden. The Fifth Circuit's alternative view of the issue seemed to help it conclude that the district court did not commit reversible error by confusing the jurors as to what would happen if the jury were not unanimous.

***1105** The relevant portion of the jury instructions states:

Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence. . . . If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended. . . . In order to bring back a verdict recommending the punishment of death or life without

the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty. [FN558]

The court did not find error in the district court's failure to repeat the unanimity requirement or failure to instruct the jury on the effect of a non- unanimous jury. [FN559] In so finding, the court claimed that it had to examine the jury instructions "in their entirety." [FN560] Additionally, the court emphatically stated that federal courts were not constitutionally required to give instructions as to what happens if the jury is not unanimous. [FN561] Further, the court noted that the federal scheme requires a unanimous vote by the jury or no verdict results; [FN562] therefore, the court was not bound by precedent from Louisiana, a state employing a death penalty scheme which expressly provides that life imprisonment results if a unanimous decision for death is not reached. [FN563]

***1106** The Fifth Circuit also failed to find error in the jury verdict forms. [FN564] The jury verdict form for the "lesser sentence" only required the signature of the foreperson whereas the jury forms for death and life imprisonment without parole required the signatures of all the jurors. [FN565] The court reviewed for plain error and found error, but the court did not reverse because it claimed that when the jury verdict forms were read "in light of the entire jury instructions," no jury confusion could possibly result. [FN566]

In considering the prejudicial effect that the district court's jury instructions and jury forms could have had on a reasonable juror, the court refused to look at two juror affidavits which arguably showed that two jurors were, in fact, confused about whether the judge could impose a lesser sentence if the jury was not unanimous. [FN567] The court properly deemed the affidavits inadmissible in accordance with Rule 606(b) of the Federal Rules of Evidence. [FN568] The court emphasized that it would not allow a jury to impeach its own verdict. [FN569] Overall, the Fifth Circuit found that any possible jury confusion did not rise to the level of reversible error. [FN570]

However, when viewed "in its entirety," the jury instructions arguably gave the impression that the judge could impose a lesser sentence if the jury was not unanimous. [FN571] The provision of the jury instructions telling the jury not to worry about what happens if the jury cannot reach a decision on death or life imprisonment without parole, stating that it was "a matter for the court to decide in the event [the jury] conclude[s] that a sentence of death or life without the possibility of release should not be recommended," [FN572] seems quite prejudicial. Arguably, the court implied that if the jury was not unanimous, the district judge could impose a lesser sentence. When the jury instructions and jury forms are "read in their entirety" whether or not coupled with the affidavits of two jurors stating that confusion did, in fact, lend itself to the unanimous sentence of death imposed in Jones, it is obvious that the district court committed prejudicial error in its instructions to the jury. [FN573]

***1107** V. Walking Away From Jones

The Fifth Circuit's opinion in United States v. Jones is significant for a number of reasons. Because no other federal appeals court has reviewed the provisions of the FDPA, Jones marks out a place in history as the first federal appellate court opinion construing the FDPA. In addition to its status, the Fifth Circuit's opinion in Jones represents a good window into the FDPA because of the broad array of challenges entertained by the court and the court's systematic, workmanlike approach to the FDPA. Walking away from Jones, we know that the FDPA is not per se unconstitutional. [FN574] We also know that the prosecutor's broad discretion to create non-statutory aggravating factors is not an improper delegation of legislative power by Congress. [FN575] As well, the relaxed evidentiary standard and lack of proportionality review do not jeopardize the constitutionality of the FDPA. [FN576] In fact, the relaxed evidentiary standard actually helps to ensure an individualized sentencing, and the Constitution only requires "meaningful review," not proportionality review. [FN577]

Aside from its general reiteration of death penalty jurisprudence, the Fifth Circuit broke new ground in Jones. Specifically, the Fifth Circuit defined the FDPA as merely procedural, not substantive. Because the FDPA is closely analogous to a sentence enhancement statute, the Fifth Circuit treated the FDPA as a procedural statute. Although a narrow view of the Fifth Circuit's holding implies only that the FDPA's sentencing options must give

way to the sentencing options provided in the substantive criminal statute, the Fifth Circuit's holding could be viewed more broadly. By stating that the "substantive criminal statute takes precedence over the death penalty sentencing provisions," [FN578] the Fifth Circuit implied that the substantive criminal statute at issue could trump the FDPA on any conflict over provisions, not just sentencing options. Consequently, after Jones, one might find that any conflict between the FDPA and a substantive criminal statute will result in favor of the substantive law.

The Fifth Circuit also held that a non-unanimous jury at the sentencing hearing results in discharge of that jury and impaneling of a new jury. [FN579] While the Fifth Circuit's holding definitively solves the dilemma over non- unanimous juries at the sentencing hearing, the Fifth Circuit's holding is suspect in many regards. The Fifth Circuit's opinion is unsupported by statutory analysis, and in fact, a detailed statutory analysis seems to rebut the *1108 Fifth Circuit's holding. Specifically, the Fifth Circuit failed to analyze the FDPA as a whole, construing the purpose of all statutory provisions-specifically overlooking section 3594's "otherwise" language which seemingly implies a default to the district court judge if the jury does not recommend death or life imprisonment without release. Notwithstanding the Fifth Circuit's failure to perform an adequate statutory analysis, impaneling a new jury in every "hung jury" situation could lead to absurd results by possibly subjecting defendants to a cycle of repeated sentencing hearings.

The Fifth Circuit also joined the ranks of federal appellate courts that have construed challenges to the duplicative nature of statutory and non-statutory aggravating factors. While the Fifth Circuit employed harmless error review in this context, the Fifth Circuit arguably failed to properly perform the harmless error review. The Supreme Court requires a harmless error review to scrutinize and thoroughly analyze the effect of the invalid aggravating factor(s). The Fifth Circuit's opinion makes only a bald assertion that the invalid aggravating factors did not affect the jury's decision. [FN580] Therefore, the Fifth Circuit's opinion unconstitutionally assumes that the invalid aggravating factors did not affect the jury's decision.

The FDPA is new and relatively untested. By adding Jones to the mix of district court cases interpreting the FDPA, federal death penalty jurisprudence is sharpened into focus. The FDPA passed the Fifth Circuit's test in Jones; however, the statute is still in "constitutional limbo." Until the Supreme Court hears a case under either the FDPA or the Drug Kingpin Act, federal death penalty law will remain uncertain.

While Jones has answered some questions about the FDPA, it seems to have raised even more questions about the statute and its penumbras. Specifically concerning the defendant, Louis Jones: can we really say that his sentence of death was administered without "arbitrariness" or "capricious- ness?" Was Louis Jones' sentence of death "wanton and freakish?" While the Fifth Circuit addressed each point of error systematically and found that the sentence was not "cruel and unusual," the court arguably overlooked the prejudice which grew and compounded with every error at the district court level. For now, however, the Fifth Circuit's opinion will occupy its honorary position as the premiere authority on the FDPA for the Fifth Circuit and all federal courts.

Louis Jones committed an atrocious murder and may truly deserve the death penalty for his crime; however, death penalty jurisprudence interpreting the Fifth and Eighth Amendments of the United States Constitution requires the procedures for imposition of a sentence of death to provide adequately for "due process" and to be free of any indication of an "arbitrary and capricious' *1109 imposition of a death sentence. [FN581] Because the district court committed several errors which arguably could have justified the court's reversal and remand, the Fifth Circuit should have reversed and remanded for re-sentencing by another jury. While reprehensible crimes deserve the death penalty, the imposition of the death sentence should not be at the expense of good federal death penalty jurisprudence anymore than it should be at the expense of the defendant's right to an individualized sentence. [FN582]

FN1. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (arguing that police wiretapping violated Olmstead's constitutional rights). The cited quotation, included in the concluding paragraph of Justice Brandeis' dissent, reads as follows:
Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to

observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.
Id. (Brandeis, J., dissenting); see also Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Justice Brandeis' dissent in Olmstead for the proposition that the government and judiciary should not come into court with dirty hands, specifically referring to violations of the Fourth Amendment protection against search and seizure without a warrant).
Timothy McVeigh, the convicted Oklahoma City bomber, quoted Justice Brandeis' dissent in Olmstead at his sentencing hearing, saying: "If the Court please, I wish to use the words of Justice Brandeis dissenting in Olmstead to speak for me. He wrote, 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.' That's all I have." Transcript of Hearing Where McVeigh Was Formally Sentenced to Death, Associated Press, Aug. 14, 1997, available in 1997 WL 4879465; McVeigh Sentencing Transcript, Daily Oklahoman, Aug. 15, 1997, available in 1997 WL 1529509. McVeigh either indirectly admitted his guilt by criticizing the government as a lawbreaker, thereby attempting to justify his own actions, or he could have been criticizing the government's actions in his conviction and sentencing.

FN2. 132 F.3d 232, 237 (5th Cir. 1998); see Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified in main part at 18 U.S.C. §§ 3591-98 (1994), also codified in scattered sections of 18 U.S.C.).

FN3. Jones, 132 F.3d at 237; 18 U.S.C. § 1201.

FN4. See Jones, 132 F.3d at 237-53; see infra Part IV.

FN5. See infra Part IV.B.

FN6. See United States v. McVeigh, 958 F. Supp. 512, 514-15 (D. Colo. 1997) (holding that victims of the bombing were entitled to attend the trial and still give "impact" testimony); United States v. McVeigh, 944 F. Supp. 1478, 1483-91 (D. Colo. 1996) (entertaining challenges to the review provisions of the FDPA, the government's notice of intent to seek the death penalty, and the particular aggravating factors alleged by the government); United States v. Nguyen, 928 F. Supp. 1525, 1532-52 (D. Kan. 1996) (entertaining a comprehensive list of challenges to the FDPA and the particular aggravating factors alleged); United States v. Chanthadara, 928 F. Supp. 1055, 1057-59 (D. Kan. 1996) (entertaining challenges to the evidentiary standards of the sentencing hearing, procedure followed by government, categories of substantive offenses, and aggravating factors); United States v. Roman, 931 F. Supp. 960, 962-63 (D. R.I. 1996) (entertaining a motion to compel the government to reveal aggravating factors prior to the government's notice of intent to seek death penalty); Nichols v. Reno, 931 F. Supp. 748, 751-52 (D. Colo. 1996), aff'd, 124 F.3d 1376 (10th Cir. 1997) (entertaining a suit for a declaration that notice of intention to seek death penalty was invalid due to the Attorney General's violation of the United States Attorney's Manual); United States v. Davis, 912 F. Supp. 938, 941-50 (E.D. La. 1996) (determining the validity of various non-statutory aggravating factors); United States v. Davis, 904 F. Supp. 554, 557-63 (E.D. La. 1995) (entertaining various challenges to the federal statutory capital sentencing scheme). These cases represent the exclusive list of district court cases construing the FDPA only to the extent that non-published district court opinions, such as United States v. Jones at the district court level, are not considered. Although Nichols v. Reno has reached the appellate level, this case is technically not the first case to reach the appellate court level because it concerns itself only with a pre- trial motion, like all of the aforementioned district court cases. 124 F.3d 1376, 1378 (10th Cir. 1997). The Tenth Circuit in Nichols affirmed the district court's holding. See id. The court found that the Attorney General violated none of Nichols' rights under the Administrative Procedure Act or Due Process Clause of the United States Constitution by failing to comply with the procedure for notice of intent to seek the death penalty outlined in the United States Attorney's Manual. See id.

FN7. See infra notes 453-72, 487-92 and accompanying text.

FN8. See infra notes 487-525 and accompanying text.

FN9. See infra notes 523-25 and accompanying text.

FN10. See infra notes 453-72 and accompanying text.

FN11. Specifically, note the Fifth Circuit's review of whether the duplication and vagueness of the non-statutory aggravating factors warranted reversal and remand. See infra notes 453-72 and accompanying discussion.

FN12. See Jean-Pierre Goyer, Capital Punishment: New Material 1965-1972 34-35 (1972).

FN13. See id. at 35. Goyer shows the distribution per type of crime: "[M] urder (3,334 executions out of 3,859 or 86.4%), rape (455 executions or 11.8%), kidnapping (20 executions), armed robbery (25 executions), burglary (11 executions), aggravated assault (6 executions) and espionage or sabotage (8 executions). For other crimes, the death penalty has fallen into disuse." Id.; see also 134 Cong. Rec. E2815 (daily ed. Sep. 7, 1988) (extension of remarks by Rep. Clay) ("Between the years 1930 and 1982, 3,800 persons were officially executed in the United States.").

FN14. See Goyer, supra note 12, at 35 ("Between 1965 and 1971 only ten executions took place, seven in 1965, one in 1966 and two in 1967. There were none in 1968, 1969, 1970, or 1971, at least up to September of that year.").

FN15. See Nichols' Attorneys Argue Against Use of Death Penalty, Dallas Morning News, Nov. 21, 1995, at D16, available in 1995 WL 9073548; see also 140 Cong. Rec. S5340 (daily ed. May 6, 1994) (statement of Sen. Moseley-Brown) ("No Federal executions have been carried out since 1963 and, until very recently, prosecutions under federal death penalty law were rare.").

FN16. 408 U.S. 238 (1972) (per curiam).

FN17. The Senate in 1968, and the House of Representatives in 1972, held subcommittee hearings considering abolition of the federal death penalty. See Peggy M. Tobolowsky, Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders, 18 J. Contemp. L. 47, 48 (1992).

FN18. See id. But cf. Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 410 (1995) ("The dearth of executions in the years preceding Furman was more likely a product of the NAACP Legal Defense Fund's 'moratorium' litigation strategy than it was an indication of popular attitudes about capital punishment.")

FN19. See infra notes 76-77 and accompanying discussion. In 1988, Congress enacted death penalty sentencing in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4387-95 (codified as amended at 21 U.S.C. § 848 (1994)).

FN20. 408 U.S. 238 (1972) (per curiam).

FN21. See id. at 239.

FN22. Id. at 239-40 (emphasis added). Because the death penalty statutes in question were state enactments, the Eighth Amendment applied to the states only through the Fourteenth Amendment's Due Process Clause. See id. at 240-41 (Douglas, J., concurring).

FN23. See id. For a narrow view of the holding in Furman, see Paul D. Kamenar, Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement, 24 Wake Forest L. Rev. 881, 892 (1989) (arguing that because the per curiam opinion only reversed the cases before the Court, and the nine concurring opinions attached to the per curiam opinion were only persuasive authority, the Court's holding did nothing more than reverse the cases before the Court and invalidate the procedures of Georgia and Texas).

FN24. See Kamenar, supra note 23, at 892.

FN25. See Furman, 408 U.S. at 240. For a good analysis of the holdings of each justice and the possibility of a different outcome based upon a change in the Court's composition, see Kamenar, supra note 23, at 892-95.

FN26. See Furman, 408 U.S. at 240-470.

FN27. Id. at 309 (Stewart, J., concurring).

FN28. Id. (Stewart, J., concurring).

FN29. Id. at 310 (Stewart, J., concurring). The statutes in question were found to be unconstitutional through a violation of the Eighth Amendment's prohibition against "cruel and unusual punishment," made applicable to the states by way of the Fourteenth Amendment's due process protection. See id. at 239-40.

FN30. See id. at 310 (Stewart, J., concurring).

FN31. Randall Coyne & Lyn Entzeroth, Capital Punishment and the Judicial Process 150 (1996-97 Supplement); see also Tobolowsky, supra note 17, at 47-48 (purporting that Furman invalidated every death penalty statute in the country); Julian S. Nicholls, Comment, Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States, 5 Emory Int'l L. Rev. 617, 623 (1991) (purporting that Furman effectively eliminated all state death penalty legislation). Indeed, the idea that Furman invalidated every death penalty statute became the "popular belief." See Kamenar, supra note 23, at 881. For a contrary view with respect to the federal death penalty statutes, see id. at 884-85, 891-92, 894-95 (explaining that all federal death penalty statutes left on the books after Furman were still constitutional, without further legislative changes, because the federal sentencing scheme already possessed the twin procedural features that were lacking in the Georgia and Texas schemes struck down by the Court in 1976; also arguing that because of changes in the personnel of the Court, the Court would not find these statutes unconstitutional; and concluding that the current federal death penalty statutes just need a little reinforcing).

FN32. See Dana L. Bogie, Note, Life or Death? The Death Penalty in the United States and the New Republic of South Africa, 3 Tulsa J. Comp. & Int'l L. 229, 247 (1996); Gary Casimir, Comment, Payne v. Tennessee: Overlooking Capital Sentencing Jurisprudence and Stare Decisis, 19 New Eng. J. Crim. & Civ. Confinement 427, 441 (1993); Nicholls, supra note 31, at 623.

FN33. See Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) ("The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." (citations omitted)). Justice White's concurring opinion in Furman relied most heavily on the infrequent imposition of the death penalty. See Furman, 408 U.S. at 313 (White, J., concurring). However, "[i]t turned out, of course, that Justice White was way off the mark." Steiker & Steiker, supra note 18, at 410. Moreover, public opinion polls indicated majority support for the death penalty in 1972, and the post-Furman legislative reaction of 35 states and the federal government clearly demonstrated this support. See id.

FN34. See Antihijacking Act of 1974, Pub. L. No. 93-366, § 103(b), 88 Stat. 409, 410 (codified as amended at 49 U.S.C. § 1155(b) (1994)); see also Gregg, 428 U.S. at 179-80; Kamenar, supra note 23, at 881 n.2 (explaining that the Aircraft Piracy Statute (Federal Aviation Act of 1958) "was the only federal death penalty statute amended after Furman to provide additional procedural safeguards").

FN35. See Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, § 201, 86 Stat. 1072 (codified at 18 U.S.C. § 1201 (1994)); see also Kamenar, supra note 23, at 881 n.2. The Kidnapping Statute was amended in 1994 by the FDPA to once again provide for the imposition of a death sentence. See Pub. L. 103-322, Title VI, Sept. 13, 1994, 108 Stat. 1959 (codified in 18 U.S.C. § 1201 (1994)).

FN36. See Kamenar, supra note 23, at 881, n.2.

FN37. See Coyne & Entzeroth, supra note 31, at 148-49. Apparently, David Bruck of the Federal Death Penalty Resource Counsel assigned these statutes the nickname "zombie statutes" because they were neither amended nor deleted from the United States Code after Furman. See id. at 148 n.4. The list of 18 "zombie statutes" also included the two statutes that Congress attempted to bring in line with Furman: (1) Aircraft hijacking resulting in death (Aircraft Piracy Statute (Federal Aviation Act of 1958), 49 U.S.C. § 1155(b)), and (2) Kidnapping resulting in death (Kidnapping

Act, 18 U.S.C. § 1201). See id. at 148-49.

FN38. 428 U.S. 153 (1976).

FN39. See id. at 153.

FN40. Id.

FN41. See id. at 163.

FN42. See id. (defining the six crimes as "murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking").

FN43. See id. at 164-65.

FN44. See id. at 164. The statute failed to offer guidance as to the scope of the non-statutory mitigating and aggravating factors, except to say that the non-statutory aggravating factors were limited to those "authorized by law." See id.

FN45. See id. at 189 ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The plurality opinion of the Court in Gregg found that the new Georgia death penalty statute "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. For a contrary view, see Justice Blackmun's dissent from the denial of certiorari in Callins v. Collins, 510 U.S. 1141, 1144 (1994), which implies that the two functions are contradictory. See also Callins, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari) (abandoning the battle for developing "procedural and substantive rules" for imposition of the death penalty and conceding that "the death penalty experiment has failed"). Specifically, Justice Blackmun stated that "[t]he problems [which] were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, as virulent and pernicious as they were in their original form." Id. (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun seemed to be implying that the two separate goals of consistency (lack of arbitrariness) and individualized sentencing could not be satisfied together. See id. (Blackmun, J., dissenting from denial of certiorari).

FN46. See Gregg, 428 U.S. at 166.

FN47. See id. at 166-67. The third requirement represents a form of comparative proportionality review in death penalty statutes. See David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 Seton Hall L. Rev. 1582, 1585 (1996) (arguing that Furman embodies a commitment to comparative proportionality). Twenty-one states require the highest court of the state to review all death penalty cases by comparing them with similar cases in order to ensure that the punishment of death is not excessive. See id. In making this determination, the court usually considers the dual requirements of Furman: (1) the character of the crime and (2) the record and character of the defendant. See id.; Gregg, 428 U.S. at 206.

FN48. See Gregg, 428 U.S. at 207.

FN49. See id. at 187.

FN50. See id. at 196-206.

FN51. See id. at 195.

FN52. See id.

FN53. See id. at 206.

FN54. The Court construed the holding in Furman to be that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189.

FN55. See id. at 206.

FN56. 428 U.S. 242 (1976).

FN57. 428 U.S. 262 (1976).

FN58. 428 U.S. 280 (1976).

FN59. 428 U.S. 325 (1976).

FN60. See Proffitt, 428 U.S. at 243; Jurek, 428 U.S. at 264; Woodson, 428 U.S. at 281-82 ; Roberts, 428 U.S. at 326.

FN61. See Proffitt, 428 U.S. at 248-49, 259-60.

FN62. See Jurek, 428 U.S. at 268-69.

FN63. See Woodson, 428 U.S. at 304 (noting that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); Roberts, 428 U.S. at 333. The Louisiana statute attempted to narrow the class of convicted defendants eligible for the death penalty by creating a new crime called "first-degree murder," which was very similar in definition to the crime of "capital murder" created by Texas. See id. However, while the Court found Texas' statute constitutional in Jurek, the Court found that without any further possibility of putting on mitigating evidence in order to individualize the conviction, the statute violated the Constitution. See id. (citing Williams v. New York, 337 U.S. 241, 247 (1949)). The Court in Roberts emphasized that "[t]he futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" Id. (quoting Williams, 337 U.S. at 247).

FN64. See Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Proffitt, 428 U.S. at 248-49; Jurek, 428 U.S. at 269.

FN65. Woodson, 428 U.S. at 305.

FN66. See Woodson, 428 U.S. at 304-05; Roberts, 428 U.S. at 336; But cf. Kamenar, supra note 23, at 884-86 (hypothesizing that because the Court in Furman and Gregg established only a need for guiding and channeling of discretion in the imposition of the death penalty, a statute that imposes death automatically on a narrow class of criminals, such as assassins of the President or traitors, would probably be upheld). It should be noted, however, that the Kamenar position looks past the second requirement of the Court-that the jury consider the individual characteristics and record of the defendant. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333.

FN67. See Woodson, 428 U.S. at 305; Roberts, 428 U.S. at 333.

FN68. See Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

FN69. See Gregg, 428 U.S. at 190-92; Proffitt, 428 U.S. at 248-49, 259- 60.

FN70. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333-34.

FN71. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333-34.

FN72. See Gregg, 428 U.S. at 190-93.

FN73. See id. at 195. A bifurcated trial allows the jury to have the necessary information during the sentencing hearing without prejudicing the defendant during the trial. See id.

FN74. See Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Pulley v. Harris, 465 U.S. 37, 45 (1984); Gregg, 428 U.S. at 195, 198, 204-06; Proffitt, 428 U.S. at 253. While the Supreme Court in Gregg noted that Georgia's automatic right to appeal provided a fundamental safeguard, the Court also noted that the procedures in Georgia's statute were not the only way to comply with the requirements of Furman. See Gregg, 428 U.S. at 195.

FN75. See Gregg, 428 U.S. at 195.

FN76. See id.

FN77. In fact, most of the statutes remained on the books exactly as they were before Furman, until the FDPA resurrected them. See Kamenar, supra note 23, at 881 n.2; see also Coyne & Entzeroth, supra note 31, at 148 (citing the unaffected "zombie statutes").

FN78. See Charles O. Jones, Separate but Equal Branches 42-45 (1995).

FN79. See Harry A. Chernoff, The Politics of Crime, 33 Harv. J. on Legis. 527, 534 (1996).

FN80. See id. at 533-38.

FN81. See id. at 527 (noting that the Violent Crime Control and Law Enforcement Act of 1994 was the "product of several political crosswinds"). Democratic Senator Joseph Biden and Representative Charles Schumer banned together to "implement a long-term political strategy to reposition their party." Id. at 538. As well, "[u]nder Biden and Schumer's leadership, Democratic crime proposals during this period regularly called for expansion of the death penalty to cover more than fifty new offenses." Id.

FN82. See id. at 533-35 (noting that Ronald Reagan made crime a priority, specifically focusing on capital punishment).

FN83. See Comprehensive Crime Control Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

FN84. See Testimony of Kenneth R. Feinberg Before the House Subcommittee on Criminal Justice, 146 Prac. L. Inst. Crim. L. & Urban Probs. 841, 849-50 (1987). Mr. Feinberg recommended against delay in the enactment of the Sentencing Guidelines: [For fear of] mischievous amendments which could test the bipartisan spirit which gave rise to the comprehensive sentencing reforms. In particular, the death penalty looms large as a likely amendment to any legislative vehicle. The inability of the Commission itself to avoid the subject of the death penalty leads me to conclude that theory must give way to reality and that delay-however useful it might be-is not achievable without running unacceptable political risks that the guidelines would be held hostage to other law enforcement amendments designed to play to the constituents back home. . . . Experience tells us that carefully considered criminal justice legislation and national politics do not mix.
Id. (emphasis added).

FN85. See supra note 84.

FN86. See Drug Kingpin Act, Pub. L. No. 100-690, § 7001(a)(2), 102 Stat. 4181, 4387 (1988) (codified at 21 U.S.C. § 848 (1994)).

FN87. See 21 U.S.C. § 848(e)(1).

FN88. See Death Penalty for Drug Kingpins-A Constitutional Idea Whose Time Has Come, 135 Cong. Rec. S13,684-02, available in 1989 WL 186261 (daily ed. Oct. 18, 1989) (comments by Senator Alphonse D'Amato) (arguing for imposition of the death penalty for anyone found to be in the leadership of major drug organizations,

whether or not a death resulted, based on a finding that other crimes not involving death and narrowly drawn over a matter that caused enormous magnitude of public harm-such as treason, espionage, and airliner hijacking-have been deemed constitutional); see also 137 Cong. Rec. S8497 (daily ed. June 24, 1991) (statement by Sen. Biden). Senator Biden stated:
Mr. President, in 1986 this Senator and 96 others voted for a drug kingpin death penalty which is now the law. Last year and again this year, the administration returned to the Senate with a new drug kingpin death penalty. To any listener, including my colleagues, they are wondering what is all this drug kingpin death penalty stuff: You were just telling me, we have a death penalty for drug kingpins and now you are telling me there is a new amendment for drug kingpins. How is it different?
Id. In answer to the dilemma, Senator Biden explained that the 1988 "Drug Kingpin Death Penalty" can only be employed where death results, and anyone involved in a drug enterprise, not only drug kingpins, can be sentenced to death under the 1988 Act. See id. In contrast, Senator Biden explained that under the new proposal, the "Biden-Thurmond Substitute," the death penalty could be imposed (1) for a kingpin without death resulting, (2) for anyone in a drug ring who attempt murder, and (3) for a felony murder involving a drug deal. See id.

FN89. See 21 U.S.C. § 848(e).

FN90. See id. §§ 848(k), (n)(1). The FDPA's sentencing phase procedures were largely modeled after the Drug Kingpin Act. See 139 Cong. Rec. S459 (daily ed. Jan. 22, 1994) (statement of Sen. Thurmond). Senator Thurmond, in introducing the Federal Death Penalty Act of 1993, stated: "[T]his bill provides procedures similar to those put in place by the death penalty included in the drug bill." Id.

FN91. See Chernoff, supra note 79, at 535-39. Candidate George Bush argued that "the war on crime will not be won until liberals stop coddling criminals." Id.

FN92. See S. 21, 101st Cong., 1st Sess. (1989).

FN93. See S. 1225, Title II, 101st Cong., 1st Sess. (1989).

FN94. See Kamenar, supra note 23, at 882 n.6 ("Despite the public opinion polls showing that the overwhelming majority of the American people support the death penalty, passage of these bills by the Congress, especially by the House of Representatives, is not expected."); see also 138 Cong. Rec. S16,162 (daily ed. Oct. 1, 1992) (statement by Sen. Hatch) ("[The Federal Death Penalty Act of 1992] stands in contrast to the Democratic crime bill which emerged from the conference. That bill took the most liberal, procriminal, provisions on the death penalty, habeas corpus, and the exclusionary rule passed by either the Senate or the House of Representatives.").

FN95. See 135 Cong. Rec. S289-01, S299 (daily ed. Jan. 25, 1989); 136 Cong. Rec. S7306 (daily ed. June 5, 1990) (statement by Sen. Biden); 137 Cong. Rec. S579-01, S833 (Jan. 14, 1991); 139 Cong. Rec. S195-02, (Jan. 21, 1993).

FN96. While the bill passed the Senate and a similar bill passed the House in 1990, Congress failed to send the bill to the President.

FN97. See Chernoff, supra note 79, at 538 (quoting Senator Biden as jokingly saying, "Democratic proposals 'did everything but hang people for jaywalking' "). Democratic Senator Biden and Representative Schumer introduced a democratic version of President Bush's crime plan. See id. at 539.

FN98. See 137 Cong. Rec. S8488-03 (June 24, 1991). This bi-partisan proposal truly exemplified the compromising nature of politics, as both Republicans and Democrats made concessions to the other party. See id. at S8488-89.

FN99. See Chernoff, supra note 79, at 542-44 (noting that Clinton's victory over Bush was at least partially due to Clinton's "tough on crime" campaign). Electing a Democratic President to the White House shifted the balance of power on the crime issue: the Democratic Party took the bully pulpit. See id. at 542 (noting the comment of Senator Orrin Hatch (R-Utah) in 1991 that "'President [Bush] has a better pulpit [and that] [i]f Democrat's don't compromise, they're going to have a rough time in 1992'").

FN100. Id. at 547 (arguing that Clinton failed to push the crime issue after campaigning to put 100,000 more cops on the street because no one in the Cabinet or staff was a strong anti-crime proponent). Whatever the reasons for President Clinton's withdrawal from the crime issue, Congress inherited the task of passing crime legislation in 1992-94. See id. at 549-56. This task was led by Senator Joseph Biden and Representative Charles Schumer for the Democrats. See id. at 550. However, Senator Strom Thurmond and Senator Orin Hatch seemed to spearhead the Republican efforts. See 138 Cong. Rec. S16,143- 04, S16,161 (1992) (comments by Senator Orin Hatch, introducing the Crime Control Act of 1992); 139 Cong. Rec. S195-02, S459 (1993) (comments by Senator Strom Thurmond, introducing the Federal Death Penalty Act of 1993).

FN101. See Chernoff, supra note 79, at 566. Senator Majority Leader Bob Dole called the crime bill "too much pork and too little punch." See id. Senator Phil Gramm claimed that the bill "coddled criminals." See id. at 562. Senator Bob Walker criticized the bill as "welfare for criminals." See id. at 563.

FN102. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.). Although the two Acts passed in different years, that quirk seems attributable to the failure of Congress to rename the Crime Control Act to 1994.

FN103. See Chernoff, supra note 79, at 570-73.

FN104. See Charles K. Eldred, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 294-96 (1994).

FN105. See 139 Cong. Rec. S195-02, S459 (1993) (comments by Senator Thurmond) ("The bill I am offering today comports with the constitutional requirements outlined by the Supreme Court and establishes procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death.").

FN106. See **United States v. Jones, 132 F.3d 232, 247 (5th Cir. 1998)** ("The FDPA acts like a sentence enhancement provision in that it does not add to or otherwise affect the penalties available under the substantive criminal statutes."); see also 135 Cong. Rec. S289-01, S300 (1989) (comments by Senator Strom Thurmond) (noting that the Federal Death Penalty Act only "establishes the procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death").

FN107. See Dave Harmon, New Law for Death Penalty Faces Test in Bombing Trial, Denv. Post, May 28, 1995, at A2, available in 1995 WL 6574294; Dave Harmon, Federal Death Penalty Faces Tests, Ft. Worth Star-Telegram, May 2, 1995, at 1, available in 1995 WL 5651850; G. Robert Hillman, McVeigh Faces Expanded Death Penalty Law: 60 Types of Federal Crimes Now Qualify, Dallas Morn. News, June 4, 1997, at 22A, available in 1997 WL 2674514.

FN108. See 139 Cong. Rec. S195-02, S459 (1993) (comments of Senator Thurmond) ("This bill provides procedures similar to those put in place by the death penalty included in the drug bill.").

FN109. Compare 18 U.S.C. §§ 3591-98 (1994) with 21 U.S.C. § 848 (1994).

FN110. See Gregg v. Georgia, 428 U.S. 153, 195 (1976).

FN111. Compare 18 U.S.C. §§ 3591-98 (using aggravating and mitigating factors to guide the jury's discretion, and providing for appellate review) with Gregg, 428 U.S. at 195 (recommending the use of bifurcated guilt and sentencing procedures).

FN112. Examples include the requirement of notice of intent to seek the death penalty and the two threshold findings of at least one aggravating factor from two separate lists. See, e.g., 18 U.S.C. §§ 3591(2)(a), 3593(a), (d)-(e).

FN113. Examples include the prosecutor's broad discretion to create non- statutory aggravating factors and a relaxed evidentiary standard. See, e.g., United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996) (holding that the prosecutor's discretion to create non-statutory aggravating factors is not an improper delegation of legislative power by Congress); United States v. Chanthadara, 928 F. Supp. 1055, 1059 (D. Kan. 1996) (holding that the relaxed evidentiary

standard for federal capital sentencing hearings does not violate the Eighth Amendment of the Constitution).

FN114. The actual text of the Federal Death Penalty Act of 1994 is not limited to the portions codified in 18 U.S.C. §§ 3591-98 (the actual procedures for implementation of a sentence of death); it includes portions now codified in Title 18 of the United States Code at sections 36, 37, 1118-21, 2245, 2280, 2281, and 2332a (making certain existing crimes death eligible and creating death eligible crimes). See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (1994) (codified in main part at 18 U.S.C. §§ 3591-98 (1994) and in scattered sections of 18 U.S.C.).

FN115. See, e.g., Slain Girl's Kin Weep as Screams Replayed, Dallas Morn. News, Oct. 26, 1995, at 29A, available in 1995 WL 9068408 (purporting that the FDPA added 60 new federal capital punishment crimes); Trial Starts for First Person to Face Execution Under New U.S. Law, Hous. Chron., Oct. 2, 1995, at 17A, available in 1995 WL 9406819 (purporting that the FDPA allows for 60 more federal capital crimes). Cf. Chris Payne, Jury's Still Out on Federal Death Penalty, Dallas Morn. News, June 2, 1996, at 1A, available in 1996 WL 2126780 (purporting that the FDPA created 53 capital crimes); Coyne & Entzeroth, supra note 31, at 145 (referring to the FDPA's dramatic expansion of the number of offenses punishable by death).

FN116. See Coyne & Entzeroth, supra note 31, at 145-46.

FN117. See, e.g., 18 U.S.C. § 3591(b)(1)-(2).

FN118. See Coyne & Entzeroth, supra note 31, at 145-46.

FN119. See 18 U.S.C. §§ 3591-98.

FN120. Id. § 3591(a)(2).

FN121. See Coyne & Entzeroth, supra, note 31, at 145-46.

FN122. See id. at 148 n.4 (explaining that David Bruck of the Federal Death Penalty Resource Counsel first coined the term "zombie statutes" in reference to the statutes that became dormant after Furman).

FN123. See id. Despite being "dead" after Furman, the zombie statutes were never modified or removed from the United States Code. See id. Therefore, these "lost statutes" seem to have existed in a place analogous to Peter Pan's "Never, Never Land" in the sense that they were neither amended nor deleted and they possessed no legal effect.

FN124. See id. at 148.

FN125. 139 Cong. Rec. S459 (daily ed. Jan. 21, 1993) (statement by Senator Thurmond). In introducing the FDPA, Senator Thurmond stated:
The bill I am offering today comports with the constitutional requirements outlined by the Supreme Court and establishes the procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death . . . . [T]his bill [also] authorizes the death penalty for the following offenses: First, certain attempts to assassinate the President; second, murder by a Federal prisoner serving a life term in a Federal correctional institution; third, hostage taking situations where death results to the hostage, or to a person attempting to rescue a hostage or apprehend the hostage takers; fourth, murder for hire and murder in aid of racketeering activity; and fifth, genocide where death results.
Id.

FN126. See Coyne & Entzeroth, supra note 31, at 145-49 (dividing the crimes into 20 newly created crimes, 17 death eligible crimes made incorporated into the FDPA's provisions, and eight other existing crimes made death eligible for a total of 45 crimes); cf. Charles K. Eldred, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 296-98 (1994) (finding only 30 crimes). Although this number is not exactly in line with the purported "sixty new death eligible crimes," the discrepancy could be attributed to legislative puffing. See generally 140 Cong. Rec. S12,434 (daily ed. Aug. 24, 1994) (statement of Sen. Kerrey) ("That is why this bill expands the Federal death penalty to cover about 60

new offenses . . . ."); 140 Cong. Rec. S12,413 (daily ed. Aug. 24, 1994) (statement of Sen. Feinstein) ("This bill would take it up to 60 death penalty crimes."). But see 140 Cong. Rec. H2242 (daily ed. Apr. 13, 1994) (statement of Rep. Hughes) ("To a lot of members, the 50 death penalties in there are not enough, they would like to have 50 more."); 140 Cong. Rec. H2259- 05 (daily ed. April 14, 1994) (statement of Rep. Meek) ("Right or wrong, this crime bill makes 66 new crimes punishable by the death penalty."). As well, some of the crimes are possibly being counted two or three times because various derivations of the crime are punishable by death under the same statute. See, e.g., Coyne & Entzeroth, supra note 31, at 148 (counting a "violati[on of] a person's federally-protected rights based on race, religion, or national origin, where death results" as only one crime; thereby arriving at less than 60 crimes).

FN127. See Charles Kenneth Eldred, Comment, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 296-98 (1994).

FN128. See id.

FN129. See 18 U.S.C. § 2381 (1994).

FN130. See id. § 794.

FN131. See id. § 3591(b)(1).

FN132. See id. § 3591(b)(2). It should be noted that section 3591(b) is the true "Drug Kingpin Act." Although the Federal Death Penalty Act of 1988 has come to be known as the Drug Kingpin Act, that is really a misnomer. For further discussion of the confusion between the Drug Kingpin Act and section 3591(b) of the FDPA, see supra note 88 discussing the legislative history of the Drug Kingpin Act.

FN133. See Coyne & Entzeroth, supra note 31, at 148-49 (discussing the revival of these statutes by application of the procedural provisions of the FDPA).

FN134. See generally Kamenar, supra note 23, at 886-891 (contending that treason, espionage, and attempted assassination of the President were all enforceable without additional procedural safeguards because they were very narrowly drawn and affected an area of great public concern, and noting that a form of the bifurcated procedure relied on by the Court was already present). An amendment to the FDPA allowing death to be imposed on a defendant attempting assassination of the President passed the Senate but failed the House. See H.R. Conf. Rep. No. 103-711, 103d Cong., 2d Sess. (1994); 140 Cong. Rec. H8772-03, H8772-03 (daily ed. Aug. 21, 1994).

FN135. See 137 Cong. Rec. S8496-01, S8499 (daily ed. June 24, 1991) (comments by Senator Orin Hatch) ("There has always been a Federal death penalty, and there has always been a Federal death penalty for non-homicide offenses. To begin with, death has always been the traditional and accepted punishment for treason, as well as for some forms of espionage. This is true worldwide, and it is reflected in our Federal Criminal Code. . . . The Supreme Court has never said nor implied that the current prescribed penalty for treason-death-is in any way unconstitutional.").

FN136. See Kamenar, supra note 23, at 886-88 (relying on the historical use of the death penalty for crimes of treason and espionage to bolster an argument for the validity of the federal death penalty for treason, espionage, and other crimes even after Furman). The imposition of a death penalty for a non-homicide drug-related offense has no history except for its creation in the Federal Death Penalty Act of 1994. See 18 U.S.C. § 1391(b) (1994).

FN137. 433 U.S. 584 (1977) (holding the death penalty unconstitutional when imposed for the rape of an adult woman). This holding implied that virtually any sentence of death for a non-homicide crime would be struck down as unconstitutional. See id. at 592.

FN138. See Robert G. McCloskey, The American Supreme Court 160 (2d. ed. 1994).

FN139. See Kamenar, supra note 23, at 886-88; see also Coker, 433 U.S. at 598 (viewing the decision of whether a crime can be punishable by death as turning on the "moral depravity" of the crime and the "injury to the person and to

the public").

FN140. See Coker, 433 U.S. at 598 (allowing the death penalty for murder because of its injury to the public); see also Death Penalty for Drug Kingpins-Constitutional Idea Whose Time Has Come, 135 Cong. Rec. S13,684-02, S13,688 (1989), available in 1989 WL 186261; 137 Cong. Rec. S8496-01, S8497 (daily ed. June 24, 1991) (comments by Senator Strom Thurmond) ("In the case of treason or espionage, they ought to get the death penalty. Drug kingpins ought to get the death penalty. Drug kingpins, who provide drugs and cause deaths of these young people and others, ought to get the death penalty."). The Justice Department stated: [T]he Department [of Justice] is of the view that the Congress may impose the death penalty for non-homicidal crimes which imperil national security or threaten the fabric of our society, or pose a moral danger to a large number of our people. The more narrowly drawn the category of offender, so as to target those most culpable of wreaking broad societal harm, the more likely that a "drug kingpin" death penalty statute would pass constitutional muster.135 Cong. Rec. at S13,684-02, S13,688 (1989), available in 1989 WL 186261 (statement of Edward S. G. Dennis, Jr., Assistant Attorney General, Criminal Division).

FN141. See 18 U.S.C. § 3592(d); Coyne & Entzeroth, supra note 31, at 147.

FN142. See McCloskey, supra note 138, at 160 (explaining that no state in the 1980s had reimposed the death penalty for anything other than murder).

FN143. See Coyne & Entzeroth, supra note 31, at 147.

FN144. 18 U.S.C. § 3591(b)(1).

FN145. See Coyne & Entzeroth, supra note 31, at 147.

FN146. See id.

FN147. See id.

FN148. See 18 U.S.C. § 1393(a) (requiring the government to file a notice of intent to seek the death penalty).

FN149. See id.

FN150. See id.

FN151. See id.

FN152. See id.; see also Lankford v. Idaho, 500 U.S. 110 (1991) (holding that the defendant is entitled to notice of intent to seek the death penalty according to the Due Process Clause of the Fifth Amendment); Coyne & Entzeroth, supra note 31, at 151-52 (noting that the FDPA's notice of intent to seek the death penalty goes beyond the requirements of Lankford by mandating that the notice be received before trial).

FN153. See 21 U.S.C. § 848 (1994).

FN154. See Lankford, 500 U.S. at 127.

FN155. Courts are likely to interpret "reasonable time" as only a few days before trial. According to the Lankford Court, any notice served before trial is in compliance with the Fifth Amendment's due process guarantees. See id.

FN156. For insight into how the Court might treat a violation of the statute, see Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1997), aff'd, 124 F.3d 1376 (10th Cir. 1997) (holding that the Attorney General's violation of the United States Attorney's Manual by announcing she would seek the death penalty before any intent to seek the death penalty was filed or sent to the defendant did not violate the defendant's due process rights or the FDPA because the language of the

United States Attorney's Manual was not implicitly read into the FDPA). Therefore, Nichols seems to imply that a violation of the FDPA's notice requirement would violate the defendant's due process rights because the notice requirement is contained in the statute.

FN157. See 18 U.S.C. § 3593(a)(1) (providing notice); id. § 3593(a)(2) (providing information regarding aggravating factors the government will seek to prove).

FN158. See id. § 3593(a)(1). This requirement was not present in the Drug Kingpin Act. See 21 U.S.C. § 848(h)(1)(A).

FN159. See 18 U.S.C. § 3593(a)(2).

FN160. Compare id. § 3593(a)(1) with 21 U.S.C. § 848 (h)(1)(A).

FN161. See United States v. McVeigh, 944 F. Supp. 1478 (D. Colo. 1996) (entertaining challenges to the review provisions of the FDPA and the Government's notice of intent to seek the death penalty and the particular aggravating factors alleged by the Government); United States v. Nguyen, 928 F. Supp. 1525 (D. Kan. 1996) (entertaining a comprehensive list of challenges to the FDPA and the particular aggravating factors alleged); United States v. Chanthadara, 928 F. Supp. 1055 (D. Kan. 1996) (entertaining challenges to the evidentiary standards of the sentencing hearing, procedures followed by the Government, categories of substantive offenses, and aggravating factors); United States v. Davis, 912 F. Supp. 938 (E.D. La. 1996) (determining the validity of various non-statutory aggravating factors); United States v. Davis, 940 F. Supp. 554 (E.D. La. 1995) (entertaining various challenges to the federal statutory capital sentencing scheme).

FN162. See United States v. Roman, 931 F. Supp. 960 (D. R.I. 1996).

FN163. See 18 U.S.C. § 3593(a).

FN164. See id.

FN165. See id. § 3593(b) (providing that the defendant must be found guilty of a crime subject to the death penalty before the sentencing hearing can be held).

FN166. See id. § 3593(a); see also 21 U.S.C. § 848(h)(1)(B) (1994).

FN167. See 18 U.S.C. § 3593(a). A showing of "good cause" might be found in situations where no evidence arises during the trial. The FDPA seems to leave the determination of "good cause" to the discretion of the trial judge. See id.

FN168. See id. § 3593(b).

FN169. Id. § 3593.

FN170. See id. § 3593(b).

FN171. See id. (referring to the requirements of § 3593(a)).

FN172. See id. (referring to the requirements of § 3591).

FN173. See id. § 3593(b)(2) (giving four examples of special circumstances where a new jury is impaneled: (1) the defendant plead guilty at the trial stage, (2) the defendant was convicted by a judge at the trial stage, (3) the original jury was discharged for a good cause, or (4) the hearing was conducted as part of a remand or reconsideration of the original sentence); see also id. § 3593(b)(3) (allowing the district court judge to make the decision if the defendant

requests and the Government gives its approval).

FN174. See id. § 3593(b).

FN175. See Gregg v. Georgia, 428 U.S. 153, 190-91 (1976).

FN176. See 18 U.S.C. §§ 3591-98.

FN177. See id. § 3594 (binding the judge to the jury's determination of a sentence of death).

FN178. See id. (stating that the court "shall" impose a sentence of death upon a recommendation by the jury).

FN179. See Gregg, 428 U.S. at 206 (interpreting the requirements of Furman).

FN180. See 18 U.S.C. § 3592.

FN181. The non-homicide death-eligible offenses are treason, espionage, and the two drug offenses authorized under section 3591(b). See id. § 3591(a)(1) (referencing 18 U.S.C. § 794, espionage, and 18 U.S.C. § 2381, treason); id. § 3591(b).

FN182. See Eldred, supra note 127, at 296-98.

FN183. See 18 U.S.C. § 3591(a)(2).

FN184. See id.

FN185. See id. § 3591(a)(2)(A)-(B).

FN186. Id. § 3591(a)(2)(C)-(D).

FN187. See id. § 3591(a)(2).

FN188. See id. § 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

FN189. See id. § 3593(a)(2).

FN190. See id. § 3593(c) ("The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a)."). Although the government is technically limited to the aggravating factors for which notice has been provided, the government is provided with a statutory rescue. See id.; id. § 3593(a)(2). If the government can show "good cause," the court has the discretion to allow the government to amend its notice of intent to seek the death penalty. See id. § 3593(a)(2). The FDPA gives no indication of the sort of circumstances which would satisfy the "good cause" standard, but a court is likely to use this vague language to the advantage of the government in cases where new evidence is discovered in a gruesome murder.

FN191. See id. § 3592(b)-(d).

FN192. See id. § 3593(e) (referring the Government to the appropriate aggravating factor list depending on the type of crime); see also id. § 3592(b)-(d) (providing the three lists of aggravating factors depending on the type of crime).

FN193. See id. § 3592(c). The factors are: death during commission of another crime; previous conviction of violent

felony involving firearm; previous conviction of an offense for which a sentence of death or life imprisonment was authorized; previous conviction of other serious offenses; grave risk of death to additional persons; heinous, cruel, or depraved manner of committing the offense; procurement of the offense by payment, pecuniary gain; substantial planning and premeditation; conviction for two felony drug offenses; vulnerability of the victim; conviction for serious federal drug offenses; continuing criminal enterprise involving drug sales to minors; offense committed against a high public official; prior conviction of sexual assault or child molestation; and multiple killings or attempted killings. See id.

FN194. See id. § 3592(b). The factors are: prior espionage or treason offense, grave risk to national security, and grave risk of death. See id.

FN195. See id. § 3592(d). The factors are: previous conviction of an offense for which a sentence of death or life imprisonment was authorized, previous conviction of other serious offenses, previous serious drug felony conviction, use of firearms, distribution to persons under 21, distribution near schools, using minors in trafficking, and lethal adulterant. See id. This list might be a well-crafted attempt by Congress to get around the serious constitutional problems implied in Coker v. Georgia, 433 U.S. 584, 592 (1977), which held that the death penalty is unconstitutional for rape of an adult woman and thereby implied that the death penalty might well be unconstitutional for any non-homicide offense. See Coyne & Entzeroth, supra note 31, at 147.

FN196. See 21 U.S.C. § 848(e)(1) (1994) (requiring an "intentional killing"); id. § 848(k) (requiring a finding of at least one aggravating factor relating to intent and a finding of at least one other aggravating factor).

FN197. See id. § 848(e)(1).

FN198. See id. § 848(k); id. § 848(n)(1). Section 848(k) states: "If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist" the jury may consider other aggravating factors. Id. § 848(k) (emphasis added). The section reiterates the same proposition again: "If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist" the jury shall weigh all of the aggravating and mitigating factors to decide if death is justified. Id. (emphasis added). Section 848(n)(1) provides the following aggravating factors:

The defendant-(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury which resulted in the death of the victim; (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which-(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (ii) resulted in the death of the victim.

Id. § 848(n)(1).

FN199. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN200. See 21 U.S.C. § 848(k); id. §§ 848(n)(2)-(12). Sections 848(n)(2)-(12) provide additional aggravating factors similar to the list of aggravating factors for homicide and drug offenses under section 3592 of the FDPA. Compare 21 U.S.C. § 848(n)(2)-(12) with 18 U.S.C. § 3592(c)- (d) (1994).

FN201. See 21 U.S.C. § 848(j) ("The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt.").

FN202. The last sentence of each list of aggravating factors states: "The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(b)-(d). The Drug Kingpin Act also provides for the prosecutor's creation of non-statutory aggravating factors. See 21 U.S.C. § 848(k) ("[A] special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned.").

FN203. See 18 U.S.C. § 3593(d) (establishing that the jury may return a finding for "any other aggravating factor for

which notice has been provided under subsection (a) found to exist"); see also 21 U.S.C. § 848(d) (establishing the same requirement).

FN204. See, e.g., McCullah, 76 F.3d at 1106-07 (holding that prosecutorial discretion is not an improper delegation of power); United States v. Pretlow, 779 F. Supp. 758, 767-68 (D. N.J. 1991) (same).

FN205. See, e.g., McCullah, 76 F.3d at 1106-10. These challenges resemble typical challenges to legislation. In essence, the prosecutor's non-statutory aggravating factors are viewed as legislation. See id.

FN206. See, e.g., id. at 1111; United States v. Tipton, 90 F.3d 861, 897- 901 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997).

FN207. See, e.g., McCullah, 76 F.3d at 1107; Pretlow, 779 F. Supp. at 767-68.

FN208. See, e.g., McCullah, 76 F.3d at 1111; Tipton, 90 F.3d at 897-901.

FN209. See Tipton, 90 F.3d at 897-901.

FN210. See United States v. Flores, 63 F.3d 1342, 1373 (5th Cir. 1995), cert. denied, 117 S. Ct. 87 (1996).

FN211. Because most prosecutors likely possess no experience in drafting legislation, those that create non-statutory aggravating factors could shoot themselves in the foot. See David E. Rovella, Preparing for the Penalty Phase, Nat'l L.J., May 12, 1997, at A1. "Mr. Bright of the Southern Center for Human Rights says the government shot itself in the foot by using non-statutory factors in its declaration of intent to seek the death penalty. . . . 'Why, in a case like this, would the government want to take a chance?' he asks." Id.

FN212. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN213. See id.

FN214. See id.

FN215. See, e.g., 18 U.S.C. § 3592(c)(2)-(4),(10),(12),(15) (providing various aggravating factors relating to the record of the defendant).

FN216. See id. § 3592(a).

FN217. See id.

FN218. See id. § 3593(c).

FN219. See id. § 3592(a). The seven statutorily defined mitigating factors are: impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, mental or emotional disturbance, and victim's consent. See id. The Drug Kingpin Act also provides for statutory mitigating factors. See 21 U.S.C. § 848(m) (1994). The Drug Kingpin Act contains nine statutorily defined mitigating factors. See id. § 848(m)(1)- (9). Seven of these factors mirror the seven mitigating factors appearing in the FDPA. See id. The other two mitigating factors in the Drug Kingpin Act are the defendant's inability to foresee the grave risk created by the act and the youthfulness of the defendant. See id. The legislative history of the FDPA gives no indication why Congress left these two factors out of the FDPA.

FN220. See 18 U.S.C. § 3592(a)(8). The Drug Kingpin Act also provides for the inclusion of non-statutory mitigating factors. See 21 U.S.C. § 848(m)(10). Both the FDPA and Drug Kingpin Act use language substantially mirroring the requirement of Gregg that the jury's discretion be focused on the record and characteristics of the individual defendant.

Compare 18 U.S.C. § 3592(a)(8) (providing for the inclusion of other mitigating factors focusing on the "defendant's background, record, or character") (emphasis added), and 21 U.S.C. § 848(m)(10) (providing for the inclusion of other mitigating factors focusing on the "defendant's background or character") (emphasis added), with Gregg, 428 U.S. at 206 (providing that the discretion of the jury be focused on the record and characteristics of the defendant).

FN221. See 18 U.S.C. § 3593(a)(2).

FN222. The FDPA lacks any reference to the defendant's responsibility to submit mitigating factors before trial.

FN223. See id. § 3593(c).

FN224. See id.

FN225. See id.

FN226. See id.; see also id. § 3593(d) (explaining that a jury "shall consider all the information received during the hearing" and make a decision).

FN227. See id. § 3593(c).

FN228. See id.

FN229. See id. This represents a small change from the Drug Kingpin Act, which allows the government and the defendant to present any evidence "related to" the sentencing hearing. See 21 U.S.C. § 848(j) (1994).

FN230. See 18 U.S.C. § 3593(c). The Drug Kingpin Act allows any evidence "related to" the aggravating factors or the mitigating factors. See 21 U.S.C. § 848(j).

FN231. See 18 U.S.C. § 3593(c). This requirement is closely fashioned after the relevancy standard of Federal Rule of Evidence 403; however, it omits the word "substantially" prior to the word "outweighed." See Fed. R. Evid. 403.

FN232. See Fed. R. Evid. 403.

FN233. See 18 U.S.C. § 3593(c); Fed. R. Evid. 403.

FN234. See Fed. R. Evid. 403.

FN235. See 21 U.S.C. § 848(j).

FN236. See 18 U.S.C. § 3593(c).

FN237. Because the FDPA does not require that the probative value "substantially" outweigh the danger of unfair prejudice, the FDPA's evidentiary standard makes it more likely that borderline evidence will be excluded.

FN238. See 18 U.S.C. § 3593(c).

FN239 See id.

FN240. See id.

FN241. See id.

FN242. See id.

FN243. See id. § 3593(c)-(d).

FN244. See id. § 3593(e).

FN245. See id. §§ 3591(a)(2), 3593(d); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

FN246. See 18 U.S.C. § 3592; supra note 70 and accompanying text.

FN247. See 18 U.S.C. § 3593(e).

FN248. See Rovella, supra note 211, at A1 (explaining that non-weighing jurisdictions allow just one mitigating factor to prevent the imposition of the death penalty, whereas weighing jurisdictions allow the jury to weigh the aggravating factors against the mitigating factors to determine whether to impose a sentence of death).

FN249. See 18 U.S.C. § 3593(d).

FN250. See id.

FN251. See id.

FN252. See id. § 3593(d)-(e).

FN253. See id. § 3593(d).

FN254. See id.

FN255. See Rovella, supra note 211, at A1 (noting that burdens of proof and weighing procedures do not really affect the outcome because "'[p]eople make decisions emotionally and then construct an objective framework.'").

FN256. See 18 U.S.C. § 3593(d).

FN257. See 21 U.S.C. § 848(k) (1994) (explaining that the "jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed").

FN258. See id.

FN259. See Peyton Robinson, Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act, 45 U. Kan. L. Rev. 1491, 1498 (1997) (emphasizing that because the Drug Kingpin Act allowed the jury to disregard its findings and refuse to impose a sentence of death, the federal death penalty scheme violated the requirements of Furman and the standards of Gregg).

FN260. See 18 U.S.C. §§ 3591-98.

FN261. See Rovella, supra note 211, at A1.

FN262. See 18 U.S.C. § 3593(d)-(e).

FN263. See United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN264. See id.

FN265. See Stringer v. Black, 503 U.S. 222, 232 (1992).

FN266. See id.

FN267. Compare McCullah, 76 F.3d at 1111-14 (remanding to the trial court for reweighing), with United States v. Tipton, 90 F.3d 861, 898-901 (4th Cir. 1996) (reweighing the factors and finding harmless error), cert. denied, 117 S. Ct. 2414 (1997).

FN268. 76 F.3d at 1114.

FN269. See id. at 1111.

FN270. See id.

FN271. See id.

FN272. Id. (quoting 21 U.S.C. § 848(n)(1)(C) (1994)).

FN273. Id. (quoting the indictment's non-statutory aggravating factor).

FN274. Id.

FN275. See id.

FN276. See id.; 21 U.S.C. § 848(n)(1)(D).

FN277. 21 U.S.C. § 848(n)(1)(D).

FN278. See McCullah, 76 F.3d at 1111.

FN279. See id. (citing Stringer v. Black, 503 U.S. 222, 230-32 (1992)).

FN280. Id.

FN281. See id. at 1112; 21 U.S.C. § 848(k); see also 18 U.S.C. § 3593(e) (1994) (providing for the same weighing system as the Drug Kingpin Act).

FN282. McCullah, 76 F.3d at 1112 (quoting Stringer, 503 U.S. at 232).

FN283. See id. at 1112, 1114.

FN284. See id. (citing Stringer, 503 U.S. at 232).

FN285. See id.

FN286. See United States v. Tipton, 90 F.3d 861 (4th Cir. 1996).

FN287. See id. at 892-901.

FN288. See id. at 898-99; 21 U.S.C. § 848(n)(1) (1994). The section 848(n)(1) statutory aggravating factor

encompasses an intent requirement, and includes four separate factors-one of which must be found before the jury can impose a sentence of death. See 21 U.S.C. § 848(n)(1). Section 848(n)(1) provides:

The defendant-(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury which resulted in the death of the victim; (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which-(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (ii) resulted in the death of the victim.

Id.

FN289. See Tipton, 90 F.3d at 898, 902.

FN290. See id. at 898-99.

FN291. See id. at 899.

FN292. See id.

FN293. See id. (holding that the four sub-factors of 848(n)(1) were not meant to be found simultaneously, and recognizing that the intent of 848(n)(1) was to "focus the jury's attention upon the different levels of moral culpability" involved in the crime, thereby channeling the jury's discretion).

FN294. See id. (citing Stringer v. Black, 503 U.S. 222, 230-32 (1992)).

FN295. See id. at 899 n.22; Stringer, 503 U.S. at 230-32.

FN296. See Tipton, 90 F.3d at 899 (citing Clemons v. Mississippi, 494 U.S. 738, 754 (1990)).

FN297. See id.

FN298. See id. at 901.

FN299. See id. at 900.

FN300. See id.

FN301. See id.

FN302. See id.

FN303. See id. But cf. United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996) (deciding that although the statutory factors were not absolutely identical, the fact that one factor subsumed the other was enough overlapping to warrant reversal and remand for reweighing), cert. denied, 117 S. Ct. 1699 (1997). Here, the Fourth Circuit used the fact of subsumption to help prove the harmlessness of the district court's erroneous instruction. See Tipton, 90 F.3d at 900.

FN304. See Tipton, 90 F.3d at 900.

FN305. See id.

FN306. See id.

FN307. See id. at 901.

FN308. Id.

FN309. Id.

FN310. See 18 U.S.C. § 3593(e) (1994).

FN311. See id.

FN312. See id.

FN313. See id. § 3594 ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly."). Although the jury is technically making a "recommendation" to the court, the jury's recommendation is more aptly characterized as a final determination or a mandate. See Robinson, supra note 265, at 1498-99.

FN314. 18 U.S.C. § 3594 ("Otherwise, the court shall impose any lesser sentence that is authorized by law.").

FN315. See id. § 3593(e) (allowing the jury to vote for death, life imprisonment without parole, or some other lesser sentence).

FN316. Compare id. ("Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."), with 21 U.S.C. § 848(k) (1994) ("Based upon this consideration, the jury by unanimous vote . . . shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence.").

FN317. See 18 U.S.C. § 3593(e).

FN318. See 21 U.S.C. § 848(k).

FN319. See id. § 848(l) ("Otherwise the court shall impose a sentence, other than death, authorized by law.").

FN320. See 18 U.S.C. § 3593(e).

FN321. See id. § 3594 ("Otherwise, the court shall impose any lesser sentence that is authorized by law."). But cf. United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998) (noting that the failure to reach a unanimous decision regarding sentencing would result in a second hearing in front of a second jury impaneled for that purpose).

FN322. See 18 U.S.C. § 3593(c)-(e).

FN323. See id.

FN324. See id. § 3595. The Drug Kingpin Act also provides for the defendant's right to appeal a death sentence. See 21 U.S.C. § 848(q).

FN325. See 18 U.S.C. § 3595(a).

FN326. See Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Pulley v. Harris, 465 U.S. 37, 45 (1984); Gregg v. Georgia, 428 U.S. 153, 195, 198, 204-06 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976).

FN327. See 18 U.S.C. § 3595(b).

FN328. Id. § 3595(c)(1).

FN329. See id. § 3595(2)(A)-(C).

FN330. Id. § 3595(c)(2)(A).

FN331. Id. § 3595(c)(2)(B).

FN332. Id. § 3595(c)(2)(C).

FN333. See id. § 3595(c)(2).

FN334. The Georgia death penalty statute at issue in Gregg required the Georgia Supreme Court to automatically review every case and to compare the case with cases of other defendants who were similarly situated. See Gregg v. Georgia, 428 U.S. 153, 166-67 (1976).

FN335. See Robinson, supra note 259, at 1494. According to one commentator:
[T]he provision for an absolute jury determination of the life or death of a defendant under the Drug Kingpin Act assures inconsistent and unfair results. The similar jury provision under the Federal Death Penalty Act of 1994 suffers from the same fundamental problem. The balancing of accuracy and uniformity in the hands of various and varied juries is doomed to end in the arbitrary and capricious results the Supreme Court determined to be unconstitutional in Furman. Id.

FN336. See 18 U.S.C. § 3593(b)(3) (allowing the court to act as decision- maker upon motion by the defendant and approval of the government).

FN337. See generally Robinson, supra note 259, at 1508-10 (arguing that the FDPA and the Drug Kingpin Act's vesting of full discretion with the jury creates disparate results among federal decisions due to the large geographic domain and the demographic differences among the federal courts). Robinson stated, "Like all federal laws, the [Drug Kingpin Act and FDPA] should be applied consistently throughout the country." Id.

FN338. See 18 U.S.C. § 3595.

FN339. See Jack Douglas, Jr., Appeals Could Tie Case Up for Years, Fort Worth Star-Telegram, June 3, 1997, at 19, available in 1997 WL 4845753; see also Roberto Suro, Decision May Become Benchmark in Capital Punishment Debate, Wash. Post, June 14, 1997, at A10, available in 1997 WL 11161041 (explaining that McVeigh will join the ranks of twelve federal death row inmates).

FN340. 944 F. Supp. 1478 (D. Colo. 1996); see also United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997) (construing the Victim Rights Clarification Act of 1997).

FN341. The judge has issued opinions for his pre-trial decisions over the FDPA for both defendants in the Oklahoma City Bombing; Timothy McVeigh and Terry Nichols. See McVeigh, 958 F. Supp. at 512. In addition, Judge Matsch has published the full text of many of the briefs and trial transcripts involved in the case, and they are available in a special Westlaw Database called "Okla- Trans," "McVeigh-Trans," or "Nichols-Trans." See, e.g., 1995 WL 967977 (W.D. Okla. Doc.) ("Memorandum in Support of Motion to Strike Notice of Intention To Seek the Death Penalty as to Defendant Timothy James McVeigh"); 1995 WL 747110 (W.D. Okla. Doc.) ("Brief of the United States in Opposition to Defendant's Motions to Strike to the Notices of Intent to Seek the Death Penalty"); 1996 WL 11794 (W.D. Okla. Doc.) ("Reply Brief of Defendant Timothy James McVeigh in Support of Motion to Strike the Notice of Intention to Seek the Death Penalty"). Finally, Terry Nichols also brought a civil action against Attorney General Janet Reno, and the Fourth Circuit has already heard the appeal in that case. See Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996), aff'd, 124 F.3d 1376 (10th Cir. 1997).

FN342. See Suro, supra note 339, at A10 (prophesizing the benchmark status of McVeigh because of the rareness of the crime and the ease with which society will overwhelmingly condemn the criminal).

FN343. 132 F.3d 232 (5th Cir. 1998).

FN344. See id. at 237.

FN345. Appellant's Initial Brief at 6, United States v. Jones, 132 F.3d 232 (5th Cir. 1998) (Nos. 96-10113, 96-10448).

FN346. See Jones, 132 F.3d at 237.

FN347. See id.

FN348. See id.; see also Appellant's Initial Brief at 18, Jones (Nos. 96- 10113, 96-10448) ("Surprisingly, Sandy did not report this alleged incident to authorities until prompted to do so by the [Air Force investigators] on March 1, 1995-nearly two weeks after the incident allegedly occurred.").

FN349. See Jones, 132 F.3d at 237.

FN350. See id.

FN351. See id.

FN352. See id.

FN353. Appellant's Initial Brief at 5, Jones (Nos. 96-10113, 96-10448); see Jones, 132 F.3d at 237-39.

FN354. See Appellant's Initial Brief at 5, Jones (Nos. 96-10113, 96-10448); ("On September 13, 1995, the government gave notice of its intention to seek the death penalty in the event Jones was convicted of the offense charged in Count 1. On October 16 through October 23, 1995, Jones was tried by jury before the Honorable Sam R. Cummings in the Northern District of Texas, Lubbock Division. On October 23, 1995, the jury returned a verdict of guilty against Jones on both counts. On October 24 through November 3, 1995, a separate sentencing hearing was held before the same jury that decided guilt/innocence.").

FN355. See Jones, 132 F.3d at 238; see also 18 U.S.C. § 3591(a) (1994) (requiring a finding of at least one of the four factors before the jury can impose a death sentence). The jury found both that "Jones intentionally killed McBride," and that "Jones intentionally inflicted seriously [sic] bodily injury that resulted in the death of McBride." Jones, 132 F.3d at 238.

FN356. See Jones, 132 F.3d at 238.

FN357. See id. The two statutory aggravating factors found by the jury were that "Jones caused the death of the victim or the injury resulting in the death of the victim during the commission of the offense of kidnapping; and Jones committed the offense in an especially heinous, cruel, and depraved manner." Id.

FN358. See id. The jury found the following two non-statutory aggravating factors: "McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and McBride's personal characteristics and the effect of the offense on her family." Id.

FN359. See id. In a footnote, the Fifth Circuit provided a break-down of the 11 mitigating factors submitted to the jury with the number of jurors finding each factor to exist by a preponderance of the evidence: "(1) the defendant Louis Jones did not have a significant prior criminal record [6]; (2) the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of the law was significantly impaired, regardless of whether

the capacity was so impaired as to constitute a defense to the charge [2]; (3) the defendant committed the offense under severe mental or emotional disturbance [1]; (4) the defendant was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) [4]; (5) the defendant served his country well in Desert Storm, Grenada, and for 22 years in the United States Army [8]; (6) the defendant is likely to be a well-behaved inmate [3]; (7) the defendant is remorseful for the crime he committed [4]; (8) the defendant's daughter will be harmed by the emotional trauma of her father's execution [9]; (9) the defendant was under unusual and substantial internally generated duress and stress at the time of the offense [3]; (10) the defendant suffered from numerous neurological or psychological disorders at the time of the offense [1]; and (11) other factors in the defendant's background or character militate against the death penalty [0]. Additionally, seven jurors added Jones's ex-wife Sandra Lane as a mitigating factor." Id. at 238 n.3. Although one of the factors was not found by any of the juror's, the addition of the defendant's ex-wife as a mitigating factor brought the total mitigating factors found by the jury back up to 11. See id.

FN360. See id. at 239.

FN361. See id. at 237.

FN362. See id.

FN363. See id.

FN364. See id.; Furman v. Georgia, 408 U.S. 238, 239 (1972). However, note that in Jones, unlike Furman, the Eighth Amendment was not being applied through the Fourteenth Amendment because the Eighth Amendment is already applicable to the federal government. See Jones, 132 F.3d at 239-42. The Fourteenth Amendment made the Eight Amendment's prohibition against "cruel and unusual punishment" applicable to the state death penalty procedures in Furman. See Furman, 408 U.S. at 239.

FN365. See Jones, 132 F.3d at 239.

FN366. See id. at 239-42. The defendant also raised a constitutional challenge to the FDPA, alleging that it was per se unconstitutional because all impositions of a sentence of death are unconstitutional under the "cruel and unusual punishment clause" of the Eighth Amendment. See id. at 242. The Fifth Circuit quickly and summarily rejected this argument, citing to Gregg v. Georgia and McCleskey v. Kemp. See id. (citing McCleskey v. Kemp, 481 U.S. 279, 300-03 (1987); Gregg v. Georgia, 428 U.S. 153, 96 (1976)).

FN367. See Rovella, supra note 211, at A9; Jack Douglas, Jr., Appeals Could Tie Cases Up for Years, Fort Worth Star-Telegram, June 3, 1997, at 19, available in 1997 WL 4845753.

FN368. See Jones, 132 F.3d at 239-40.

FN369. See id. at 239 (citing Touby v. United States, 500 U.S. 160, 165 (1991); United States v. Mistretta, 488 U.S. 361, 371 (1989)).

FN370. Id. (citing Mistretta, 488 U.S. at 372).

FN371. Id. (citing United States v. Tipton, 90 F.3d 861, 895 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997)); accord Mistretta, 488 U.S. at 390; United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN372. See Jones, 132 F.3d at 239 (citing United States v. Armstrong, 517 U.S. 456 (1996); United States v. Johnson, 91 F.3d 695, 698 (5th Cir. 1996)).

FN373. See id. at 239-40.

FN374. See id. at 240 (citing 18 U.S.C. § 3593(a) (1994)).

FN375. See id. (citing Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that the Fifth Amendment "due process clause" requires aggravating factors to genuinely narrow the class of death eligible defendants)); see also Gregg, 428 U.S. at 206 (holding that the Eighth Amendment requires a jury's discretion to be narrowed).

FN376. See **Jones, 132 F.3d at 240** (citing 18 U.S.C. § 3593(c)).

FN377. See id. (citing 18 U.S.C. § 3593(d)).

FN378. See, e.g., United States v. Tipton, 90 F.3d 861, 895 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN379. See, e.g., Zant, 462 U.S. at 878.

FN380. See **Jones, 132 F.3d at 240-42**.

FN381. See **Id. at 240** (citing Pulley v. Harris, 465 U.S. 37, 43, 44-45 (1984)).

FN382. See e.g., Baldus, supra note 47, at 1585.

FN383. See **Jones, 132 F.3d at 240 (citing Pulley, 466 U.S. at 43, 44-45)**.

FN384. See id.

FN385. See supra notes 335, 337 and accompanying text (explaining the FDPA's evidentiary standard).

FN386. See **Jones, 132 F.3d at 241**.

FN387. See **id. at 242**; see supra notes 231-37 and accompanying text..

FN388. See **Jones, 132 F.3d at 241-42**.

FN389. **Id. at 242** (citing United States v. Nguyen, 928 F. Supp. 1525, 1546-47 (D. Kan. 1996)).

FN390. See id. (citing Jurek v. Texas, 428 U.S. 262, 276 (1976)).

FN391. See supra notes 231-37 and accompanying text. As the Fifth Circuit noted, the evidentiary standard under the FDPA actually excludes more prejudicial information than the Federal Rules of Evidence. See **Jones, 132 F.3d at 241 n.7**; 18 U.S.C. § 3593(c) (1994).

FN392. See **Jones, 132 F.3d at 242**.

FN393. See **id. at 242-53**.

FN394. See **id. at 248-50**.

FN395. See **id. at 250-52**.

FN396. See **id. at 248**.

FN397. Id. The factor was based on 18 U.S.C. § 3592(c)(1) (1994). See id.

FN398. **Id. at 249**. The factor was based on 18 U.S.C. § 3592(c)(6). See id.

FN399. See **id. at 248-50**.

FN400. See **id. at 248** (citing Zant v. Stephens, 462 U.S. 862, 877 (1983)). This requirement originated in the Supreme Court's holding in Gregg. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN401. See **Jones, 132 F.3d at 249** (citing Tuilaepa v. California, 512 U.S. 967, 976 (1994)). This requirement also originated in the Supreme Court's holding in Gregg. See 428 U.S. at 206.

FN402. See **Jones, 132 F.3d at 248** (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1987)). The Fifth Circuit seemed to be referring to the Supreme Court's holding in Jurek, where the jury's discretion was narrowed at the trial stage through the use of a specially defined "capital murder" charge, and the Supreme Court's holding in Gregg, where the jury's discretion was narrowed at the penalty phase through the use of aggravating factors. See Jurek v. Texas, 428 U.S. 262, 266-67 (1976); Gregg, 428 U.S. at 205.

FN403. See **Jones, 132 F.3d at 248**.

FN404. See id.

FN405. See id. (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1987)).

FN406. See id. at 249.

FN407. See id.

FN408. See 18 U.S.C. § 1201 (1994).

FN409. See **Jones, 132 F.3d at 249**.

FN410. See id.

FN411. See id. The jury considered whether "the defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." Id.

FN412. See id. (citing Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988)).

FN413. See id. (citing United States v. Flores, 63 F.3d 1342, 1372 (5th Cir. 1995) (quoting Tuilaepa v. California, 512 U.S. 967, 975 (1994))).

FN414. See id.

FN415. Id.

FN416. See id. at 258 n.12.

FN417. Id. at 249-50 (referencing Fifth Circuit jurisprudence, specifically Flores, 63 F.3d at 1373).

FN418. See id. at 250.

FN419. Id. The government also submitted one other aggravating factor to the jury: "The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant Louis Jones." Id. However, the jury did not unanimously find that this aggravating factor was established beyond a reasonable doubt

by the government. See id.

FN420. Id.

FN421. See id. at 251.

FN422. Id. at 250-51 (citing United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997)).

FN423. Id. at 251 (citing Stringer v. Black, 503 U.S. 222, 232 (1992)).

FN424. See id.

FN425. See id. The court did not address the defendant's challenge that the non-statutory aggravating factors were overbroad. Whether the court failed to address this challenge because the factors were already deemed invalid by the duplicative challenge and the vagueness challenge, or because the overbroad challenge was an invalid challenge, is not entirely clear from the opinion.

FN426. See id. at 249 (citing Maynard v. Cartwright, 486 U.S. 356, 361- 62 (1988)).

FN427. See id. at 251. Once again, the Fifth Circuit impliedly relied on the Supreme Court's requirements enunciated in Gregg. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN428. **Jones, 132 F.3d at 251.**

FN429. See id. at 250 n.12.

FN430. See id. at 251.

FN431. See id. (quoting Maynard, 486 U.S. at 361-62).

FN432. See id.

FN433. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN434. Stringer v. Black, 503 U.S. 222 (1992).

FN435. See **Jones, 132 F.3d at 251.**

FN436. See id.

FN437. See id. (citing Clemons v. Mississippi, 494 U.S. 738, 741 (1990)).

FN438. Stringer v. Black, 503 U.S. 222, 232 (1992).

FN439. Id.

FN440. See id.

FN441. See id.

FN442. Id. at 235 (referencing the Court's holding in Zant v. Stephens, 462 U.S. 862 (1983)).

FN443. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN444. See Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981) ("Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination.").

FN445. See United States v. Tipton, 90 F.3d 861, 899 n.22 (1996).

FN446. See United States v. **Jones, 132 F.3d 232, 252 (5th Cir. 1998).**

FN447. See id.

FN448. See id. (citing Stringer v. Black, 503 U.S. 222, 230 (1992)).

FN449. See Stringer, 503 U.S. at 232; Clemons v. Mississippi, 494 U.S. 738, 741.

FN450. See Clemons, 494 U.S. at 753-54.

FN451. **Jones, 132 F.3d at 252.** The Fourth Circuit in Tipton employed this form of review. See United States v. Tipton, 90 F.3d 861, 899 (1996).

FN452. **Jones, 132 F.3d at 252.** This standard of harmless error review is the same as the first option of review-reweighing the aggravating and mitigating factors. See id. The Fifth Circuit did not find any fundamental difference in the three options, stating that "all three standards lead to the same conclusion." Id.

FN453. See id.

FN454. See id.

FN455. See id.

FN456. See id.

FN457. Id.

FN458. See id.

FN459. See Stringer v. Black, 503 U.S. 222, 230 (1992).

FN460. Id.

FN461. 90 F.3d 861, 899-901 (4th Cir. 1996).

FN462. See id.

FN463. See supra note 444 and accompanying text.

FN464. See United States v. Tipton, 90 F.3d 861, 899-901 (1996).

FN465. See **United States v. Jones, 132 F.3d 232, 252 (5th Cir. 1998).**

FN466. Stringer v. Black, 503 U.S. 222, 230 (1992).

FN467. See Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring). Justice O'Connor emphasized the importance of thorough analysis and "principled explanation" in harmless error review when she exclaimed:
[W]hile [the harmless error standard of proving beyond a reasonable doubt that the error in question did not contribute to the verdict obtained] can be met without uttering the magic words 'harmless error,' the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion.
Id. (citations omitted).

FN468. See **Jones, 132 F.3d at 252**.

FN469. See id.

FN470. United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997) (citing Engberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991)).

FN471. See id. at 1112 (finding that the jury will imply a quantitative value to each factor).

FN472. Stringer v. Black,, 503 U.S. 222, 232 (1992). Unlike the Fifth Circuit, the Fourth Circuit in Tipton found that the qualitative value of the four overlapping factors was really the same as one factor because the necessity to only find one factor was adequately explained by the judge. See United States v. Tipton, 90 F.3d 861, 899-901 (1996).

FN473. See **Jones, 132 F.3d at 242-48**.

FN474. See **id. at 243**.

FN475. See **id. at 242** (citing United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994)).

FN476. See **id. at 243** (citing Townsend, 31 F.3d at 270).

FN477. See id. (citing Townsend, 31 F.3d at 270).

FN478. See id. (citing United States v. Flores, 63 F.3d 1342, 1374 (5th Cir. 1995)).

FN479. See id. at 242-48.

FN480. See id. at 248 (holding that although the district court erred, the error was not "obvious, clear, readily apparent, or conspicuous," so any error was not plain under "plain error review").

FN481. See id. at 242.

FN482. See id. at 243.

FN483. See id. at 242.

FN484. See id. (citing United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994)).

FN485. The "and" joining the second and third prongs makes the test conjunctive. See id.

FN486. See id. at 243.

FN487. See id. at 242.

FN488. See id.

FN489. See id. at 242-43 (relying on section 3593(e) of the FDPA). Section 3593(e) provides: "Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e) (1994).

FN490. See **Jones, 132 F.3d at 243**.

FN491. See id. (citing 18 U.S.C. § 3593(b)(2)(B)).

FN492. 18 U.S.C. § 3593(b)(2)(B).

FN493. See Memorandum in Support of Motion to Strike Notice of Intention to Seek the Death Penalty as to Defendant Timothy James McVeigh, United States v. McVeigh, No. CR 95-110-A, 1995 WL 697977, at *10 n.7 (W.D. Okla. Doc.) ("The legislative history of the death penalty provisions of § 3591 et seq. is virtually non-existent. There were no committee reports or hearings.").

FN494. See Francis J. McCaffrey, Statutory Construction 35 (1953) ("It is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determining of the meaning of any of its parts."); see also James Willard Hurst, Dealing with Statutes 60 (1982) ("[T]hose who draft and shepherd through a measure create some pattern of policy, so that there is ground for presuming that their intent in particulars lies in the relations of those particulars to the surrounding pattern.").

FN495. See 18 U.S.C. § 3593(e). This interpretation is in accordance with the "plain meaning rule" which is first and foremost among modes of statutory interpretation. See Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process, 24 (1997) (noting that the "plain meaning rule is the constitutionally compelled starting place for any statutory construction").

FN496. See 18 U.S.C. § 3593(e) (providing that the jury can recommend a sentence of death, life imprisonment without release, or some other lesser authorized sentence).

FN497. See Mikva & Lane, supra note 495, at 24.

FN498. See 18 U.S.C. § 3593(e).

FN499. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN500. 18 U.S.C. § 3594.

FN501. See id. § 3593(e).

FN502. Id. § 3594.

FN503. Id. § 3593(e).

FN504. See McCaffrey, supra note 494, at 35 (explaining that statutes must be construed as a whole and that the entire statute must be given effect); see also General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (1968) (quoting Harrison v. Walker, 1 Ga. 32, 34 (1896)) (" 'In the construction of a statute, it is the duty of the court, if possible, to give effect to each of its enactments.' ").

FN505. See infra notes 499-522 and accompanying text.

FN506. See 18 U.S.C. § 3594.

FN507. See McCaffrey, supra note 494, at 40 ("Where the legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect was intended."); see also Hurst, supra note 494, at 59 (stating that "particular words or phrases" are read "in the light cast by other parts of the same statute").

FN508. See McCaffrey, supra note 494, at 40 (stating that "[w]here the same language is used in different parts of the same statute in relation to the same subject-matter," the language is to receive the same meaning in each context).

FN509. See 18 U.S.C. § 3594.

FN510. This interpretation is derived by reading all sections of the FDPA in their entirety. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN511. See 18 U.S.C. § 3594. This interpretation is in accordance with the "plain meaning rule" which is first and foremost among modes of statutory interpretation. See Mikva & Lane, supra note 495, at 24.

FN512. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN513. See 18 U.S.C. § 3591(a)(2).

FN514. See id. § 3593(e) (referring to section 3592's three lists of statutory aggravating factors relating to the three separate crime types); see also id. § 3593(d) (providing for the court to impose some other sentence if the jury could not find at least one aggravating factor from the three lists in section 3592).

FN515. See id. § 3593(e).

FN516. See Official Transcript of Proceedings, United States v. Nichols, No. 96-CR-68, available in 1998 WL 2518 (D. Colo. Trans.). Judge Matsch of the U.S. District Court for the District of Colorado initially noted the requirement that the jury be unanimous in its finding of at least one aggravating factor of the four statutory aggravating factors relating to intent. See id. at *2. Upon a finding that the jury was hopelessly deadlocked after reasonable deliberation, Judge Matsch discharged the jury with the understanding that he would undertake the sentencing. See id. at *4-6. Unlike the Fifth Circuit in **Jones**, Judge Matsch noted that this would be a final decision as to death. Compare id. at *5, with **United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998)**.

FN517. See 18 U.S.C. § 3593(d).

FN518. See id. ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

FN519. See 21 U.S.C. § 848(l) (1994) (using the "otherwise" language as a broad authorization-apparently a default).

FN520. Compare 18 U.S.C. § 3594 (1994), with 21 U.S.C. § 848(l) (1994). It seems to be an easier question when viewing the Drug Kingpin Act's "otherwise" language because while the Drug Kingpin Act still required a unanimous decision for death, it didn't require a unanimous decision for anything else. See 21 U.S.C. § 848(l). In that context, the "otherwise" language was obviously designed to act as a default.

FN521. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60. Looking at the entire context of the Drug Kingpin Act, it is clear that the "otherwise" language was meant very broadly. See 21 U.S.C. § 848(l).

FN522. See McCaffrey, supra note 494, at 62 (stating that weight should be given to "material contained in other acts dealing with the same subject matter").

FN523. See **United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998)**.

FN524. 18 U.S.C. § 3593(b)(2)(B).

FN525. Id. § 3593(b)(2)(C).

FN526. **Jones, 132 F.3d at 242 n.8**.

FN527. See infra notes 546-47 and accompanying text. Because the substantive law, section 1201, trumps the FDPA, sentencing is determined according to section 1201. See **Jones, 132 F.3d at 248**. Therefore, the FDPA's provision for a "lesser sentence" is inapplicable. See **id. at 247-48**. As the FDPA does not authorize the judge to impose death without a recommendation from the jury, the judge could only impose a sentence of life imprisonment without parole. See id.

FN528. See **Jones, 132 F.3d at 248** (noting that "had the jury recommended some lesser sentence, the court would have been obligated to impose life without the possibility of release as the only authorized lesser sentence"). As the effect of a non-unanimous jury under the analysis proposed by this comment is the same as a recommendation by the jury for some lesser sentence, the district court judge would have automatically imposed a sentence of life without parole. See 18 U.S.C. § 3594.

FN529. See **Jones, 132 F.3d at 242** (outlining the three prong test for abuse of discretion in failing to give requested jury instructions).

FN530. See id.

FN531. See **id. at 243-44**.

FN532. See Appellant's Initial Brief at 34-36, Jones (Nos. 96-10113, 96- 10448).

FN533. See id.

FN534. See id. at 37.

FN535. Id.

FN536. Id. The Fifth Circuit addressed the defendant's points of error in reverse order. The Fifth Circuit divided its analysis into two separate categories. First, the Fifth Circuit entertained a group of the defendant's challenges that tended to show that the district court's instructions caused the jury to believe that a non-unanimous verdict would automatically result in the district court imposing some lesser sentence. See **Jones, 132 F.3d at 243**. Second, the Fifth Circuit reviewed the defendant's challenge contending that the district court's instructions misinformed the jury that it could sentence the defendant to a lesser sentence authorized by law when, in fact, the jury could only sentence the defendant to death or life imprisonment without parole. See id. The Fifth Circuit's subtle reordering and reframing of these issues indicates that the court was straining to avoid a direct confrontation with the defendant's challenges and attempting to bolster what might otherwise appear to be an inadequate response to those challenges. The court's self-serving framework allowed it to address the defendant's threshold point of error-that the jury was improperly led to believe a lesser sentence than life imprisonment was possible-only after it had addressed all related issues of jury confusion. Thereby, the court tacticly avoided a detailed discussion of the possible prejudicial effects carrying over from the district court's erroneous instruction on a lesser sentence.

FN537. See **Jones, 132 F.3d at 243-44**; 18 U.S.C. § 3593(e) (1994).

FN538. See **Jones, 132 F.3d at 248**.

FN539. See **id. at 246** (citing Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)).

FN540. See id. (citing United States v. Flores, 63 F.3d 1342, 1374 (5th Cir. 1995)).

FN541. See id. at 243 (citing Fed. R. Crim. P. 52(b)).

FN542. See id. (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)).

FN543. Id.

FN544. See id. at 248.

FN545. See id. at 247 (citing United States v. Branch, 91 F.3d 699, 738- 40 (5th Cir. 1996)). The court analogized the FDPA to a sentence enhancement provision by finding that (1) the FDPA did not apply unless the defendant could be convicted under another section of the United States Code, (2) the FDPA only adds the sentence of death to the applicable sentences available under the other sections of the Code, and (3) the FDPA's main purpose is to provide guidelines for the sentencing hearing. See id.

FN546. Id. at 248.

FN547. See id. at 247-48 (citing 18 U.S.C. § 1201 (1994)).

FN548. See id. at 246.

FN549. See id. at 248.

FN550. See id.

FN551. Id. at 243 (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)).

FN552. See id. at 248.

FN553. Id.

FN554. See id. at 243 (citing Olano, 507 U.S. at 732-35).

FN555. See Edmund F. McGarrell, The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support, Am. Behav. Scientest, Feb. 1, 1996, at 500, available in 1996 WL 12941064 (showing that the death penalty will be imposed more often if the jury thinks that a defendant could receive some other, less harsh penalty; whereas the death penalty will be imposed less often if the jury has the option to impose a harsh, meaningful alternative); see also Appellant's Initial Brief at 34-37, Jones (Nos. 96-10113, 96-10448) (showing that two jurors supported a sentence of death because they believed that the judge could impose a lesser sentence in the event the jury could not reach a unanimous verdict).

FN556. See Appellant's Initial Brief, at 31-32, Jones (Nos. 96-10113, 96- 10448).

FN557. See Jones, 132 F.3d at 244.

FN558. Id. (emphasis added).

FN559. See id. at 244-45.

FN560. Id. at 244.

FN561. See id. at 245 (citing Allen v. United States, 164 U.S. 492, 501- 02 (1896)). But cf. Gregg v. Georgia, 428 U.S.153, 190 (1976) (stating that the jury should be adequately informed of all necessary information). Recently, the Supreme Court issued an opinion which implies that the Supreme Court may soon require juries to be informed of

whether the defendant is "parole ineligible." See Brown v. Texas, 118 S. Ct. 355, 55-56 (1997); see also Amanda Dowlen, Comment, An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying its Capital Defendants Due Process by Keeping Jurors Uninformed of Parole Eligibility?, 29 Tex. Tech L. Rev. 1043 (1998) (arguing that Texas law forbidding the consideration of parole eligibility in capital cases violates the defendant's constitutional right to due process).

FN562. See Jones, 132 F.3d at 245 (citing 18 U.S.C. § 3593(e) (1994)); see also id. at 243 (providing that a non-unanimous jury results in a "hung jury" with no verdict rendered, and it requires a new jury to be impaneled for a second sentencing hearing). But cf. supra notes 487-525 and accompanying text (hypothesizing that the FDPA does not require a unanimous jury, but defers to the district court judge in the event of non-unanimity).

FN563. See Jones, 132 F.3d at 245. The Louisiana Supreme Court found that juries must be informed of the consequences of failing to achieve a unanimous verdict. See State v. Williams, 392 So. 2d 619, 634-35 (La. 1980).

FN564. See Jones, 132 F.3d at 244-45.

FN565. See id. at 244-45.

FN566. Id. at 245.

FN567. See id. at 245-46.

FN568. See id. The court noted the defendant's argument that the Federal Rules of Evidence were inapplicable to a sentencing hearing. See id. at 246. However, the court found that even if the Federal Rules were not applicable, the reliability purpose of the Federal Rules was applicable. See id. (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

FN569. See id.

FN570. See id. at 244-46.

FN571. See id. at 243-44.

FN572. Id. at 244.

FN573. Although the jury affidavits are barred as evidence, they clearly show that "reasonable jurors" could have believed this way because two jurors actually did believe this way. See supra notes 567-70 and accompanying text; Appellant's Initial Brief [illegible] nes (Nos. 96-10113, 96-10448).

FN574. See Jones, 132 F.3d at 239-42.

FN575. See id. at 241-42.

FN576. See id.

FN577. See id.

FN578. Id. at 248.

FN579. See id. at 245.

FN580. See id. at 252.

FN581. See Gregg v. Georgia, 428 U.S. 153, 206 (1976); Barclay v. Florida, 463 U.S. 939, 991 (1983) (J. Blackmun,

dissenting). Justice Blackmun, dissenting in Barclay, eloquently summarized the importance of solid death penalty jurisprudence:

Like Justice Stevens, I cannot "applaud" the procedures and appellate analysis that have led to petitioner's death sentence. Like the Court, however, I cannot "applaud" the undertakings of petitioner and his companions that led to their victim's death in the Jacksonville area that night in June 1974. But when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. Justice Marshall's opinion convincingly demonstrates the fragility, in Barclay's case, of the application of Florida's established law. The errors and missteps-intentional or otherwise-come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court. The final result reached by the Florida courts, and now by this Court, in Barclay's case may well be deserved, but I cannot be convinced of that until the legal process of the case has been cleansed of error that is so substantial. The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation. I therefore dissent.

Id. (citations omitted).

FN582. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (referring to a convicted criminal's right to an individualized sentence of death, meaning that the jury must look at the characteristics of the crime as well as the record and characteristics of the defendant).

END OF DOCUMENT

(6)

No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 2, 1998
Certiorari Granted October 5, 1998

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1/5/98[1]	OPINION OF USCA (certified copy) in accordance with USCA judgment re: [180-1] appeal, [170-01] appeal; affirm both the conviction and sentence of death
1/5/98[2]	JUDGMENT OF USCA (certified copy) as to Louis Jones Re: [180-1] appeal, [170-1] appeal

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[1] Although this entry is taken verbatim from the docket sheet of the District Court, the date has been changed to reflect the actual date of the filing of the Fifth Circuit's opinion.

[2] Although this entry is taken verbatim from the docket sheet of the District Court, the date has been changed to reflect the actual date of the filing of the Fifth Circuit's judgment.

affirming judgment/order; it is now here ordered and adjudged by this Court that the sentence and conviction of the District Court in this cause are affirmed

3/4/98[3] Rehearing denied by USCA5

[3] This docket entry does not appear in the docket sheet of the District Court but is nonetheless included for completeness of the procedural history in this case.

SEALED

UNSEALED AS PER
NOTIFICATION FROM
U. S. ATTY'S
OFFICE 3/8/95 11:30 a.m. /s/ AL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
v.	§	6-95 C4 0015-C
	§	(Filed
LOUIS JONES	§	Mar. 7, 1995)
THE GRAND JURY CHARGES:	§	
	§	

COUNT 1

On or about February 18, 1995, in the San Angelo Division of the Northern District of Texas, the elsewhere, **LOUIS JONES**, defendant, did wilfully and unlawfully seize, confine, inveigle, kidnap, abduct, and carry away and hold for ransom, reward, and otherwise, Tracie Joy McBride, and did wilfully transport said Tracie Joy McBride from Goodfellow Air Force Base, San Angelo, Texas, said Air Force Base being within the special maritime and territorial jurisdiction of the United States; and as a result the death of Tracie Joy McBride occurred.

In violation of Title 18, United States Code, Sections 7(3) and 1201(a)(2).

COUNT 2

On or about February 18, 1995, in the San Angelo Division of the Northern District [sic] Texas, **LOUIS JONES,** defendant, at a place within the special maritime and territorial jurisdiction of the United States, namely Goodfellow Air Force Base, on land acquired for the use of the United States and under its exclusive jurisdiction, did assault Michael Alan Peacock, resulting in serious bodily injury.

In violation of Title 18, United States Code, Sections 7(3) and 113(f).

A TRUE BILL;

/s/ Illegible
FOREPERSON

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UNITED STATES ATTORNEY

/s/ Tanya K. Northrup
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	Criminal No. 5:95-CR-047-C
v.	§	
	§	
LOUIS JONES	§	

NOTICE OF INTENT TO SEEK THE DEATH PENALTY

(Filed Sept. 13, 1995)

COMES NOW, the United States of America, by and through the United States Attorney for the Northern District of Texas, and files, pursuant to Title 18, United States Code, Sections 3591 through 3593, this notice of its intent to seek the death penalty against the defendant, **LOUIS JONES,** in the event **JONES** is convicted of Count One of the Indictment, which charges kidnapping resulting in death, in violation of Title 18, United States Code, Section 1201(a), and would show the Court and the jury as follows:

I.

The United States of America believes that the circumstances of the instant offense of kidnapping resulting in death are such that, if the defendant, **LOUIS JONES,** is convicted, a sentence of death is justified under Chapter 228 of Title 18, United States Code, Sections 3591(a), 3592(a), and 3592(c).

II.

The United States of America will prove, at a hearing to be held pursuant to Title 18, United States Code, Section 3593, that:

a. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally kill Tracie Joy McBride by hitting her in the head with a tire iron;

b. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally inflict serious bodily injury, that resulted in the death of the victim, Tracie Joy McBride, by hitting her in the head with a tire iron;

c. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally participate in an act, namely hitting Tracie Joy McBride in the head with a tire iron, contemplating that the life of Tracie Joy McBride would be taken and intending that lethal force would be used in connection with Tracie Joy McBride, and the victim, Tracie Joy McBride, a person other than one of the participants in the offense, died as a direct result of the act;

d. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally and specifically engage in an act of violence, namely hitting Tracie Joy McBride in the head with a tire iron, knowing that the act created a grave risk of death to a person other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim, Tracie Joy McBride, died as a direct result of the act.

III.

The United States of America will prove the following statutory aggravating factors to justify a sentence of death:

a. the defendant, **LOUIS JONES,** caused the death and the injury resulting in the death of Tracie Joy McBride, during the commission of the offense of kidnapping (Title 18, United States Code, Section 3592(c)(1));

b. the defendant, **LOUIS JONES,** in the commission of this offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(5));

c. the defendant, **LOUIS JONES,** committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(6)); and

d. the defendant, **LOUIS JONES,** committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(9));

IV.

The United States of America will prove the following nonstatutory aggravating factors to justify a sentence of death:

a. future dangerousness to the lives and safety of other persons, as evidenced by specific threats and acts of violence, including, but not limited to the following:

1. In or about 1968, the defendant, **LOUIS JONES,** was convicted of the offense of Battery in the State of Illinois;

2. In or about 1970, the defendant, **LOUIS JONES,** in the Chicago, Illinois area, assaulted Daniel Lacko;

3. In or about February, 1994, the defendant, **LOUIS JONES,** in the San Angelo, Texas area did assault Sandra Lane (both physically and sexually) and Jessica Lane;

4. In or about March, 1994, the defendant, **LOUIS JONES,** in the San Angelo, Texas area did become involved in a confrontation with Sandra Lane on Goodfellow Air Force Base;

5. On or about February 16, 1995, the defendant, **LOUIS JONES,** in San Angelo, Texas did abduct Sandra Lane from her home at gunpoint. During the course of this abduction and prior to her release, **LOUIS JONES** among other acts, robbed and sexually assaulted Sandra Lane;

6. During the years 1988 through 1995, inclusive, the defendant, **LOUIS JONES,** engaged in assaultive behavior directed towards Sandra Lane;

See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S.Ct. 2950, 2956-2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

b. Tracie Joy McBride was 19 years old at the time of her death. She was small in stature weighing only 99 pounds and measuring 61 inches at the time of her autopsy on March 3, 1995. This is in contrast to the defendant, **LOUIS JONES,** who served over twenty years in the Army and was a member of the Army Airborne Rangers. **JONES** was highly trained in many areas including hand-to-hand combat.

Tracie Joy McBride was new to Texas and was unfamiliar with the area. She had been stationed in San Angelo, Texas at Goodfellow Air Force Base approximately 10 days prior to her abduction and had only been off base twice to receive physical therapy for knee problems.

c. Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family. *See* Title 18, United States Code, Section 3593(a) and *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597 (1991).

WHEREFORE, the United States of America, by and through the United States Attorney for the Northern District of Texas, hereby gives notice of its intent to seek the

death penalty as to **LOUIS JONES** and to introduce evidence to the jury in support of such punishment.

Respectfully submitted,

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/s/ Tanya K. Pierce
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INSTRUCTION No. 4

D. Government's Burden of Proof

The burden of proving that Louis Jones should be sentenced to death rests at all times with the government. If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones' punishment at life in prison without any possibility of release.

INSTRUCTION NO. 5

E. Unanimity Required Only for Death Sentence

This second phase of the trial differs from the first. In the first phase, I instructed you to deliberate with the goal of reaching a unanimous decision – one way or the other – as to whether the government had proved the defendants guilty beyond a reasonable doubt of the crimes charged.

In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should be not less than Life Without Possibility of Release, you should report that vote to the

Court and the Court will sentence the defendant to Life Without the Possibility of Release.

Now, the defendant at this hearing does not have to present any evidence. He does not have to prove to you that he should be permitted to live. He was, however, entitled to present any mitigating facts to you – that is, facts that favor a lesser punishment than death – should he choose to do so.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal No. 5-95-CR-0047-C
vs.	)	
LOUIS JONES,	)	
Defendant.	)	

DEFENDANT'S PRELIMINARY OBJECTIONS TO THE COURT'S CHARGE

(Filed Nov. 1, 1995)

The Defendant submits the following objections and comments to the Court's Proposed Instructions.

(1) *The "intent" findings from 18 U.S.C. § 3591(a)(2) should not be designated as "aggravating factors."* They were so designated in 21 U.S.C. § 848(n)(1), but this was a constitutional flaw in the statue [sic], and Congress corrected it in 18 U.S.C. § 3591 by redesignating these findings as threshold or preliminary findings rather than as aggravation. Therefore the the [sic] Court should change both Part One of the Special Findings Form, and all instructions that refer to the intent findings as "category one aggravating factors."

The importance of this change is that the intent factors simply establish that the defendant is constitutionally eligible for the death penalty under the eighth amendment, and this eligibility should not be treated as a separate aggravating factor (let alone 4 separate ones)

weighing against the mitigating factors and in favor of the imposition of the death penalty. See *Arave v. Creech*, 113 S.Ct. 1534, 1542 (1993) (aggravating factor is invalid if it applies to every defendant eligible for the death penalty.). If the Court declines to remove the "aggravating" designation from these threshold findings, defendant objects (in addition to objections based on statutory construction and legislative intent) on the grounds that defendant's constitutional eligibility for the death penalty under *Enmund v. Arizona* and *Tison v. Arizona* (i.e. the fact that the defendant had sufficient homicidal intent to make him death-eligible under the eighth amendment) applies by definition to every death-eligible killing, and thus does not narrow the category of murderers punishable by death: this makes the weighing of these findings on death's side of the sentencing scale invalid under the principle of *Godfrey v. Georgia*, *Stringer v. Black*, and *Arave v. Creech* that aggravating factors in death penalty cases must genuinely and meaningfully narrow the universe of killings in which death may be imposed.

In addition, the Court should require the the [sic] jury to choose *one* intent factor, not all four. These four factors represent a descending scale of personal homicidal intent, and the jury should only take up each one after deciding that the government has failed to prove the preceding one. This approach avoids the danger (still present even if the instructions do not mislabel these findings as "aggravating") that the jury will be misled into supposing that a murder is more blameworthy if four different levels of culpability are all found to apply to the defendant's conduct.

(2) On the first page of the Court's Proposed Instructions and thereafter, wherever the phrase "Justify a sentence of death" is used, the words "rather than a sentence of life imprisonment without possibility of release or a lesser sentence" should be appended immediately afterwards. The terminology about "Justifying a sentence of death" originated with 21 U.S.C. § 848, which did not explicitly allow the jury to consider any alternative sentence, and raises the problem that a juror might think death was "Justified" even though life imprisonment would have been preferable. Since the new death procedures leave absolutely no doubt that the jury is supposed to be choosing between life and death rather than simply deciding whether death is "Justified," this point should be spelled out whenever the issue before the jury is characterized or described.

(3) The introductory charge refers to the jury's power to determine whether the defendant should be sentenced to death, but omits the other sentence(s). This omission should be corrected wherever it occurs, since the false impression left by the Court's Proposed Instructions that death is some sort of presumptive sentence.

(4) On the 6th page of the instructions, references to "category two" aggravating factors should be deleted, since as mentioned above the "category one" factors are not aggravating factors at all.

(5) *Heinous, atrocious and cruel.* There is no basis for assuming that serious physical abuse can be post-mortem. In addition, there is no evidence in this case to support this aggravator. Critical to its existence is the fact that the *killing* must be Heinous, Atrocious and Cruel.

The rape or any other sexual abuse should not count as giving rise to this aggravator because the sexual abuse was not the manner of death, and (b) the torture or physical abuse must have an independent motive to inflict suffering. It is not sufficient that the murder caused suffering, in the absence of a specific intent to cause suffering. This is so both as a matter of statutory construction and as an 8th Amendment claim under *Godfrey v. Georgia*.

(6) *Substantial planning.* The instructions on the "substantial planning and premeditation" aggravator are objectionable as erroneously and unconstitutionally overbroad and vague. First, the instruction is nothing more than ordinary premeditation. There seems to be no difference between this aggravator and the state of mind needed to establish ordinary first degree murder under 18 U.S.C. § 1111. Yet there must be some difference, both because Congress presumably intended this aggravator to mean something, and because the death penalty provision of § 1111 has been universally recognized (even by the U.S. Attorneys' Manual) to be unconstitutional under *Furman* absent some further narrowing – such as a heightened premeditation and planning requirement of 18 U.S.C. § 3593(c)(9). Stated another way, even if such an all-inclusive aggravator were constitutional under the Eighth amendment, it is at least true that Congress intended this aggravator to require heightened premeditation, rather than ordinary premeditation. The defendant submits that the appropriate resolution of this issue would be to adopt Instruction No. 9 in the Defendant's Requested Sentencing Instructions.

(7) *Nonstatutory aggravation.*

If the Jury is to make written findings on nonstatutory aggravation (as is undeniably required by 18 U.S.C. § 3593(d), it would be very unfair to fail to require corresponding written findings on statutory and nonstatutory mitigation as well. The idea that the jury must make such extensive findings on every aspect of the government's allegations, but need not list or even formally poll about or discuss any of the mitigating factors submitted by the defense is manifestly unfair. The Court should require the jury to treat aggravating factors and mitigating factors even-handedly. Any failure to require similar treatment of aggravating factors and mitigating factors (i.e. written findings on both) implicitly minimizes mitigation and suggests that aggravation carries greater legal significance than mitigation, in violation of both Congressional intent of the eighth amendment principle of *Lockett v. Ohio.*

(8) *Nonstatutory aggravating factors.*

(a): Future dangerousness. Since the jury has an option of Life Without Possibility of Release, and there is no evidence that Louis Jones will be dangerous in prison, the Court should specify that this aggravator is relevant only to the question of whether a less-than-life sentence should be imposed, rather than life or death. Failing that, this aggravator should be stricken as unsupported by the evidence, and unduly prejudicial because it invites speculation on the nonexistent possibility that Louis Jones will be released from prison even if sentenced to life. *See generally, Simmons v. South Carolina.*

(b) Vulnerability. The Government has attempted to allege that the victim was somehow *particularly vulnerable,* in a fashion similar to 3592 (c)(11), owing to the various listed factors. However, the government's pretrial notice does not so allege, and the facts listed in the Court's Proposed Instructions do not on their face "aggravate" the murder in any meaningful way. There should be a limit to the number of special verdicts that the government is entitled to demand in a capital case: at this point, the effect is like requiring the jury to endorse every point of the prosecutor's final argument. Such a procedure – in which the jury is required to vote on and report is [sic] findings on every uncontested fact that helps the government's case for death, without any parallel requirement for voting on and returning special verdicts on life's side of the scales – has an obvious tendency to skew the jury's deliberative process towards death.

(c) Victim Characteristics. In this factor especially, the government has failed to allege any facts which "aggravate" the murder. Asking the jury unanimously and beyond a reasonable doubt to "find . . . the victim's characteristics," without any reference to what those characteristics might be, simply does not provide a task that the jury can perform in any rational manner. The same is also true regarding the aggravator that asked the jury to find Ms. McBride's "background" in aggravation. Likewise, the same effect of the offense on her family. As stated in the government's notice and in these proposed instructions, these allegations do not state anything capable of being found as a fact, beyond a reasonable doubt or otherwise. The jury has heard the evidence, the government will surely mention it in closing argument, but to

require the jury to "find" all these vague open-ended concepts really just invites it to consider the victim's and defendant's relative worth in deciding punishment, and to factor race into the sentencing calculus.

Both victim-based nonstatutory aggravators (a and b) should be stricken.

(9) *Mitigating factors.* The defendant objects to listing *all* the statutory mitigating factors in these instructions: the only effect of doing so is to pointlessly draw attention to the existence of mitigating factors that are concededly not present.

This part of the charge should simply be deleted, and the Court should continue on to give a single list of statutory and nonstatutory mitigating factors, without differentiating between them or informing the jury that some are statutory and some are nonstatutory. Informing the jury of the difference between statutory and nonstatutory mitigating factors merely creates a problem which must then be corrected by careful admonitions that nonstatutory factors are to be given the same consideration as statutory factors. The underlying rationale for this approach is that of *Lockett* and *Hitchock v. Dugger,* which forbids statutory limitation of relevant aggravating factors in capital cases.

(10) *Weighing process.* The defendant objects to the language about deciding whether death is "justified". This should be modified to make clear that the jury is choosing between punishments, more than one of which might be "justified."

(11) Anti-Sympathy. Defendant objects to the instruction on the jury's duty to avoid "any influence of passion, prejudice or sympathy. " The problem with such instructions is that they can be interpreted to prohibit sympathy for the defendant even when such sympathy is based entirely on the evidence. While the Supreme Court did uphold a somewhat similar instruction in *California v. Brown,* the instruction in that case referred to "mere . . . sympathy," and did not caution against *any* influence of sympathy. The Court's formulation here is more likely to be understood in its unconstitutional sense of limiting the effect to be given to mitigation.

On the other hand, it is proper for the jury not to be influenced by sympathy for the family of the victim. This problem may be resolved by an instruction on victim impact evidence as follows:

> You have heard testimony from a family member of the victim, Tracie Joy McBride. While this evidence was properly admitted in order to provide you with some information concerning Ms. McBride and concerning the effect of her death upon her family, I caution you that you are not to base your sentence on the feelings of any witness or on public opinion. Likewise, in determining whether to impose a death sentence, you must avoid any influence of passion, prejudice, or sympathy. Your deliberations should be based on the evidence you have seen and heard and the law on which I have instructed you.

Wherefore, Defendant prays that the Court grant the objections and modify the Court's Charge accordingly.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

(TITLE OMITTED IN PRINTING)

DEFENDANT'S OBJECTIONS TO THE COURT'S CHARGE (SENTENCING PHASE) (excerpted from Transcript of Separate Sentencing Hearing, Nov. 2, 1995, pp. 2702-2709)

* * *

[2702] THE COURT: ALL RIGHT. DOES THE DEFENDANT HAVE ANY OBJECTIONS OR REQUESTS?

MR. MCLARTY: YES, YOUR HONOR, WE DO. YOUR HONOR, PRIOR TO THE TIME THE COURT'S CHARGE IS READ TO THE JURY, WE WOULD OBJECT. AND AS I GO THROUGH MY OBJECTIONS, I WOULD LIKE TO JUST STATE AS A PRELIMINARY MATTER THAT THE BASIS OF OUR OBJECTIONS IN EACH AND EVERY OF THE FOLLOWING OBJECTIONS IS BASED UPON THE PROVISIONS OF THE FIFTH, SIXTH, EIGHTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION. IN ADDITION, THE BASIS OF OUR OBJECTIONS ARE FROM THE STATUTORY LANGUAGE AND STATUTORY INTENT OF THE FEDERAL DEATH PENALTY ACT OF 1984.

ON PAGE ONE OF THE COURT'S INSTRUCTIONS, THE DEFENDANT OBJECTS TO THE LANGUAGE IN THE VERY FIRST PARAGRAPH WHERE IT STATES THAT IT WOULD BE THE JURY'S RESPONSIBILITY TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH. WE WOULD MOVE THAT

THE COURT ADD THE FOLLOWING LANGUAGE – "RATHER THAN LIFE WITHOUT POSSIBILITY OF RELEASE OR A LESSER SENTENCE."

IN THE BODY OF THE COURT'S INSTRUCTIONS WE WOULD MOVE THE COURT TO ADD THAT LANGUAGE EVERY TIME THE COURT STATES THAT THE JURY IS DETERMINING WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH, ADD THE LANGUAGE "RATHER THAN LIFE WITHOUT POSSIBILITY OF RELEASE OR A LESSER SENTENCE." AND WE WOULD MOVE THAT THAT LANGUAGE BE ADDED EACH AND EVERY TIME DURING THE [2703] BODY OF THE COURT'S INSTRUCTIONS WHEREIN THAT NOTED LANGUAGE IS USED.

NEXT, THE DEFENDANT OBJECTS TO THE PARAGRAPHS RELATING TO THE JURY'S FINDING OF INTENT. THIS WOULD BE ON PAGE FOUR OF THE COURT'S INSTRUCTIONS, GIVING THE JURY THE OPTION TO DECIDE BOTH THAT THE DEFENDANT INTENTIONALLY KILLED THE VICTIM TRACIE MCBRIDE, AND INTENTIONALLY INFLICTED SERIOUS BODILY INJURY THAT RESULTED IN THE DEATH OF THE VICTIM TRACIE MCBRIDE. WE WOULD URGE THE COURT TO INSERT AN "OR" IN BETWEEN THOSE TWO CLAUSES, THE REASON BEING THAT THOSE INTENT ELEMENTS ARE LISTED IN A DISSENTING ORDER OF CULPABLE MENTAL STATE AND IT IS ONLY NECESSARY TO CHOOSE ONE. BY GIVING THE JURY THE OPTION TO CHOOSE TWO, THIS HAS A DANGER OF MISLEADING THE JURY INTO SUPPOSING THE MURDER IS SOMEHOW

MORE BLAMEWORTHY IF TWO LEVELS OF CULPABILITY ARE FOUND TO APPLY TO THE DEFENDANT'S CONDUCT.

WE WOULD OBJECT TO THE COURT'S INSTRUCTIONS ON SERIOUS – WE WOULD OBJECT TO THE COURT'S INSTRUCTIONS ON SERIOUS PHYSICAL ABUSE REGARDING THE LANGUAGE THAT SUCH ABUSE MAY BE INFLICTED EITHER BEFORE OR AFTER DEATH AND DOES NOT REQUIRE THAT THE VICTIM BE CONSCIOUS OF THE ABUSE AT THE TIME IT WAS INFLICTED. WE FIND NO BASIS, NO EVIDENCE IN THIS CASE TO SUPPOSE THAT THERE WAS ANY ABUSE INFLICTED AFTER THE DEATH RESULTED.

WE OBJECT TO THE LANGUAGE ON SUBSTANTIAL [2704] PREMEDITATION AS BEING INADEQUATE AND TOO NARROW, PURSUANT TO THE CONSTITUTIONAL REQUIREMENTS OF THE EIGHTH AMENDMENT, FOR THE PENALTY OF DEATH IN THIS CASE. THE LANGUAGE AS TO SUBSTANTIAL PLANNING AND PREMEDITATION ARE INADEQUATE TO RAISE THAT AGGRAVATING FACTOR ABOVE THE LEVEL CONTEMPLATED PURSUANT TO 18 UNITED STATES CODE 1111. HOWEVER, THERE MUST BE SOME DIFFERENCE BECAUSE CONGRESS PRESUMABLY MEANT THIS AGGRAVATOR TO MEAN SOMETHING, AND THESE LISTED INSTRUCTIONS ARE INADEQUATE TO CONSTITUTIONALLY NARROW THAT PARTICULAR AGGRAVATING CIRCUMSTANCE.

THE DEFENDANT OBJECTS TO THE INCLUSION OF THE NONSTATUTORY AGGRAVATING FACTOR OF

FUTURE DANGEROUSNESS, BECAUSE THE EVIDENCE SIMPLY DOES NOT SUPPORT THAT INSTRUCTION BEING GIVEN TO THE JURY. THE GOVERNMENT'S OWN DOCTOR, DOCTOR MARTELL, STATED THE DEFENDANT WOULDN'T BE A FUTURE THREAT.

DEFENDANT OBJECTS TO THE NONSTATUTORY AGGRAVATING FACTOR NUMBER TWO AS BEING VAGUE AND INDEFINITE, ASKING THAT THE JURY SIMPLY FIND CERTAIN FACTS WITHOUT SPECIFYING HOW IN ANY WAY THE EXISTENCE OF THOSE PARTICULAR FACTS AGGRAVATE THE KILLING IN THIS PARTICULAR CASE.

THE SAME OBJECTION WOULD APPLY TO THE NONSTATUTORY AGGRAVATING FACTOR NUMBER THREE REGARDING PERSONAL CHARACTERISTICS WITHOUT ANY STATEMENT AS TO ALLOW THE JURY TO REFERENCE WHAT THOSE CHARACTERISTICS MIGHT BE. THAT SIMPLY DOES NOT PROVIDE A TASK THE JURY CAN PERFORM IN ANY RATIONALE [2705] MANNER. THEY DO NOT STATE ANYTHING THAT ARE BEING CAPABLE OF BEING FOUND AS A FACT. WE WOULD MOVE THAT BOTH OF THOSE TWO NONSTATUTORY FACTORS SIMPLY BE STRICKEN FROM THE COURT'S CHARGE.

IN REGARD TO THE LISTING OF MITIGATING FACTORS, WE WOULD DIRECT THE COURT'S ATTENTION TO THE TENDERED PENALTY PHASE MITIGATING FORM FILED BY THE DEFENDANT ON

NOVEMBER 1ST, 1995, AND WOULD MOVE TO SUBSTITUTE THOSE INSTRUCTIONS IN THEIR ENTIRETY FOR THE LISTED FACTORS STATED BY THE COURT.

FURTHER, LET ME GO THROUGH THE VERDICT FORM REGARDING THE SPECIAL FINDINGS FORM. WE WOULD OBJECT IN THE SPECIAL FINDINGS FORM ON PART ONE, AND WOULD MOVE THAT THE COURT ADD AN "OR" AND AN INSTRUCTION IN BETWEEN CLAUSE 1-A AND 1-B THAT THE JURY IS ONLY TO FIND ONE OF SUCH FINDINGS.

DEFENDANT ALSO OBJECTS TO THE LACK OF ANY DEFINITION IN THE COURT'S INSTRUCTIONS OR IN THE VERDICT FORM REGARDING THE DEFINITION OF KNOWINGLY CREATING A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS. THIS PHRASE IS VAGUE AND CONSTITUTIONALLY AMBIGUOUS. ALSO IT IS NOT SUPPORTED BY THE EVIDENCE IN THE CASE, PARTICULARLY WITH THE EVIDENCE OF THE FORENSIC PATHOLOGIST WHO FOUND AND TESTIFIED THAT MR. PEACOCK, HIS INJURIES WERE NOT SERIOUS. SO WE WOULD OBJECT TO ANY SITUATION OF THAT ISSUE TO THE JURY.

WE OBJECT TO THE FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF FUTURE DANGEROUSNESS, LIMITING SUCH FUTURE [2706] DANGER TO THE CONTEMPLATED CONDUCT OF THE DEFENDANT IN SOLELY A PRISON ENVIRONMENT, SINCE THAT WOULD BE THE ONLY POSSIBILITY IN WHICH HE COULD BE PRESENT ANY DANGER, EVEN THOUGH THE GOVERNMENT'S OWN DOCTOR HAS STATED HE WOULD NOT PRESENT SUCH A THREAT.

AGAIN WE WOULD REITERATE OUR OBJECTIONS TO THE VAGUENESS AND THE LACK OF ANY MEANINGFUL FACT FINDING ON NONSTATUTORY AGGRAVATING FACTORS 3-B AND 3-C ON THE MITIGATING FACTORS, AGAIN PART FOUR, AND MOVE THAT THE DEFENDANT'S TENDERED PENALTY PHASE MITIGATION VERDICT FORM BE SUBMITTED SUBSTITUTED IN ITS ENTIRETY.

WE WOULD ALSO LIKE TO DIRECT THE COURT'S ATTENTION TO THE DEFENDANT'S REQUESTED SENTENCING INSTRUCTIONS FILED ON NOVEMBER 1ST, AND PARTICULARLY DIRECT THE COURT'S ATTENTION AND MOVE FOR THE INCLUSION OF INSTRUCTION NUMBER FIVE WHICH SPECIFICALLY INSTRUCTS THE JURY THAT UNANIMITY IS REQUIRED ONLY FOR A DEATH SENTENCE, AND WE WOULD MOVE THAT THE JURY BE SPECIFICALLY INSTRUCTED THAT IF THEY ARE UNABLE TO AGREE ON A DEATH VERDICT, THAT THE COURT WOULD THEN IMPOSE A LIFE WITHOUT POSSIBILITY OF RELEASE SENTENCE OR A LESSER SENTENCE.

WE WOULD MOVE THAT OUR INSTRUCTION NUMBER SIX FILED ON NOVEMBER 1ST SPECIFICALLY STATING IN SOMEWHAT MORE DETAIL THAT A DEATH SENTENCE IS NEVER REQUIRED.

WE WOULD MOVE FOR THE INCLUSION IN ITS ENTIRETY [2707] OF OUR INSTRUCTION NUMBER NINE REGARDING SUBSTANTIAL PLANNING AND PREMEDITATION.

WE WOULD MOVE FOR THE INCLUSION OF OUR PROPOSED INSTRUCTION NUMBER 16 FILED ON

NOVEMBER 1ST REGARDING THE WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS, INSTRUCTING THE JURY IN DETAIL AS TO THE FACTORS AND THE SERIOUSNESS OF THE WEIGHING FUNCTION THAT THEY ARE TO BE ENGAGED IN, AND PARTICULARLY THE FINDING AND INSTRUCTION THAT EACH JUROR MUST DECIDE WHETHER THE LAW REQUIRES THAT LOUIS JONES BE PUT TO DEATH OR NOT. AND IF EVEN ONE JUROR FINDS A MITIGATING FACTOR PRESENT WHICH IN THAT JUROR'S MIND IS NOT OUTWEIGHED BY THE AGGRAVATING FACTORS PROVED, THEN THE JURY MAY NOT SENTENCE LOUIS JONES TO DEATH.

WE WOULD ALSO MOVE FOR THE INCLUSION IN ITS ENTIRETY WHERE THEY DIFFER IN ANY WAY FROM THE COURT'S INSTRUCTIONS, EACH AND EVERY INSTRUCTION LISTED IN OUR SENTENCING INSTRUCTIONS FILED ON NOVEMBER 1ST.

I WOULD ALSO LIKE TO DIRECT THE COURT'S ATTENTION TO THE TENDERED PENALTY PHASE INSTRUCTIONS FILED ON OCTOBER 6TH BEFORE THE TRIAL BEGAN. ALSO, YOUR HONOR, IT JUST OCCURRED TO US, WE FAILED TO MENTION THIS IN OUR CHARGE CONFERENCE, AND I APOLOGIZE. IT APPEARS THAT WE SHOULD IN FACT HAVE A COURT'S INSTRUCTION AT THIS PHASE OF THE TRIAL ON THE DEFENDANT'S RIGHT NOT TO TESTIFY. SUCH A PROPOSED CHARGE HAS BEEN SUBMITTED, AND I APOLOGIZE FOR OVERLOOKING THAT IN OUR [2708] CONFERENCE. A SUITABLE

CHARGE WOULD BE CONTAINED IN THE INSTRUCTION NUMBER 24 FILED IN THE TENDERED PENALTY PHASE INSTRUCTIONS ON OCTOBER 6TH.

THE COURT: ALL RIGHT. IF MY SECRETARY IS LISTENING, I AM GOING TO ASK HER TO GO AHEAD AND PREPARE OUR STANDARD INSTRUCTION ON THE FACT THE JURY CANNOT TAKE INTO ACCOUNT THE FACT THAT THE DEFENDANT MAY NOT HAVE TESTIFIED.

MR. MCLARTY: WE WOULD MOVE THE ADOPTION OF OUR PROPOSED INSTRUCTION NUMBER 25 IN OUR OCTOBER 6TH FILING CONCERNING THE JURY'S EFFECT TO DISREGARD SPECULATION ABOUT THE ALLEGED DETERRENT EFFECT OF THE DEATH PENALTY.

WE WOULD MOVE THE ADOPTION IN WHOLE OF OUR PROPOSED INSTRUCTION NUMBER 26 FILED OCTOBER 6TH REGARDING THE DUTY TO CONSIDER MITIGATING CIRCUMSTANCES.

MR. HURLEY HAS BROUGHT SOMETHING ELSE TO MY ATTENTION. IN THE COURT'S INSTRUCTIONS TO THE JURY ON THE PAGE DISCUSSING, PAGE TEN OF THE COURT'S INSTRUCTIONS BEGINNING WITH THE PHRASE "THE DEFENDANT HAS ALLEGED VARIOUS MITIGATING FACTORS IN THIS CASE. EACH OF YOU MAY CONSIDER–" WE WOULD MOVE THE COURT TO CHANGE THE WORD "MAY" TO "MUST" OR "SHALL" IN THAT PARAGRAPH, AS WELL AS THE NEXT PARAGRAPH WHICH SAYS, "SOME OF THE MITIGATING FACTORS YOU MAY CONSIDER." WE WOULD MOVE THE COURT TO CHANGE THAT

"MAY" TO "MUST" AND "SHALL" IN ACCORDANCE WITH THE STATUTORY ACT, AND THE CONSTITUTIONAL PROVISIONS WHICH WE HAVE PREVIOUSLY MENTIONED.

[2709] WE WOULD ALSO MOVE THE COURT TO ADOPT IN ITS ENTIRETY OUR INSTRUCTION NUMBER 28 FILED ON OCTOBER 6TH REGARDING THE EFFECT AND FAILURE TO ARRIVE AT A UNANIMOUS DECISION AS TO THE PENALTY OF DEATH. AND JUST TO REITERATE, EACH AND EVERY OF THE PRECEDING OBJECTIONS HAS BEEN MADE UNDER THE PROVISIONS OF THE FIFTH, SIXTH, EIGHTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS THE STATUTORY LANGUAGE OF THE FEDERAL DEATH PENALTY ACT OF 1994, AND THE STATUTORY INTENT OF THAT STATUTE.

THE COURT: ALL RIGHT. WITH THE EXCEPTION OF THE CHARGE ON THE DEFENDANT'S NOT TESTIFYING WHICH I WILL INCLUDE, I AM GOING TO OVERRULE THE OBJECTIONS.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
LOUIS JONES -	)	5:95-CR-047-C

COURT'S INSTRUCTIONS TO THE JURY

(Filed Nov. 3, 1995)

Members of the jury, as reflected by your verdict, you have unanimously found the defendant guilty of the offense with which he was charged in Count One of the indictment. The law of the United States provides that the punishment for the offense in Count One may be death. As members of the jury, it will be your responsibility to determine whether the defendant should be sentenced to death on Count One.

In making this determination, you will be called upon to decide whether certain aggravating factors exist and, if so, whether those aggravating factors sufficiently outweigh any mitigating factor or factors found to exist or, in the absence of any mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death. An aggravating factor is a specified fact or circumstance which might indicate, or tend to indicate, that the defendant should be sentenced to death. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense, or any other fact or circumstance which might indicate, or tend

to indicate, that the defendant should not be sentenced to death.

In deciding whether aggravating or mitigating factors exist, you may consider any evidence that was presented during the guilt phase of the trial that is relevant to your inquiry regarding the existence of aggravating or mitigating factors. You may also consider any evidence that the parties presented at this sentencing hearing that is relevant to your consideration of whether aggravating or mitigating factors exist. "Relevant evidence" means evidence having any tendency to make the existence of any fact or circumstance that is of consequence to such determination more probable than it would be without the evidence. You may also make deductions and reach conclusions that reason and common sense lead you to draw from facts which have been established from the testimony and other evidence in the case. You should also consider both direct and circumstantial evidence. While you must consider all the evidence, you are not required to accept any of the evidence as true or accurate. You alone determine issues of credibility and how much weight, if any, to give testimony and other evidence.

The law does not require a defendant to produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify.

The government bears the burden of proving beyond a reasonable doubt the existence of any aggravating factor upon which it seeks to rely. While this burden is a heavy one, it is not necessary that a particular aggravating factor be proved beyond all possible doubt. It is only

required that the government's proof exclude any "reasonable doubt" about the particular aggravating factor being considered. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. The defendant does not have the burden of disproving the existence of any aggravating factor. The law does not require the defendant to produce any evidence at all. The burden is wholly upon the government to prove the existence of a particular aggravating factor beyond a reasonable doubt.

Under the law of the United States, there are statutory aggravating factors and there are also non-statutory aggravating factors. Before you may consider aggravating (statutory and nonstatutory) and mitigating factors and whether the penalty of death is an appropriate punishment in this case for the defendant, you must as a preliminary matter unanimously agree that the government has proved beyond a reasonable doubt the existence of at least one of the following circumstances with regard to the intent of the defendant as it relates to the death of Tracie Joy McBride:

The defendant, Louis Jones:

(1) intentionally killed the victim, Tracie Joy McBride;

(2) intentionally inflicted serious bodily injury that resulted in the death of the victim, Tracie Joy McBride;

If the government does not satisfy each of you beyond a reasonable doubt, based on the evidence at trial and the evidence at this hearing, that at least one of these circumstances is true, you should return a finding to that effect, and no further deliberations will be necessary.

However, if you unanimously find beyond a reasonable doubt that at least one of the circumstances listed above has been established, you will then proceed to determine whether the government has proven beyond a reasonable doubt the existence of any of the alleged statutory aggravating factors.

In this case, the government has alleged as statutory aggravating factors that:

a) the defendant caused the death or injury resulting in the death of Tracie Joy McBride during the commission of the offense of kidnapping;

b) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride;

c) the defendant committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride; and

d) the defendant committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride;

To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture *or* serious physical abuse to the victim. The terms

"heinous, cruel, or depraved" are stated in the disjunctive: any one of them individually may constitute an aggravating circumstance warranting imposition of the death penalty.

"Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.

"Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.

"Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted; and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse – unlike torture – may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it

was inflicted. However, the defendant must have specifically intended the abuse apart from the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; needless mutilation of the victim's body; senselessness of the killing; and helplessness of the victim.

The word "especially" should be given its ordinary, everyday meaning of being highly or unusually great, distinctive, peculiar, particular, or significant.

To establish the existence of the factor of substantial planning and premeditation, the government must prove that the defendant killed the victim after substantial planning *and* premeditation. The words "substantial planning and premeditation" should be given their ordinary, everyday meaning. "Planning" means mentally formulating a method for doing something or achieving some end. "Premeditation" means thinking or deliberating about something and deciding whether to do it beforehand. "Substantial planning and premeditation" is not established by simply showing that a murder was premeditated, nor that some small amount of planning preceded it. Rather, it must be shown that there was both a considerable amount of premeditation *and* that there was a considerable amount of planning preceding the murder.

If the government does not satisfy each of you beyond a reasonable doubt that at least one of these statutory aggravating factors exists you should return a finding to that effect, and no further deliberations will be necessary.

In the event that you unanimously find that the government has proven beyond a reasonable doubt the existence of at least one of the circumstances with regard to the intent of the defendant relating to the death of Tracie Joy McBride and the existence of at least one of the statutory aggravating factors, then you must consider whether the government has proved beyond a reasonable doubt the existence of any non-statutory aggravating factors. As is the case for the statutory aggravating factors, you must unanimously agree on the existence of any of the alleged nonstatutory aggravating circumstances.

The non-statutory aggravating factors that the government has alleged in this case are:

(1) the defendant's future dangerousness to the lives and safety of other persons;

(2) Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas;

(3) Tracie Joy McBride's personal characteristics and the affect of the instant offense on Tracie Joy McBride's family.

Like the statutory aggravating factors, the government bears the burden of proving beyond a reasonable doubt the existence of any of these non-statutory aggravating factors.

Whether any aggravating factor – statutory or non-statutory – has been sufficiently established is for you alone to determine, but the only aggravating factors that you may take into account are those that I have outlined for you in these instructions.

In the event that the government proves beyond a reasonable doubt the existence of aggravating factors as outlined above, you must then consider whether the defendant has proved the existence of any mitigating factors, before you may consider whether the penalty of death is an appropriate punishment in this case for the defendant.

The burden of establishing the existence of any mitigating factor is on the defendant. The defendant need only establish the existence of a mitigating factor by a preponderance of the evidence, rather than beyond a reasonable doubt. A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a contention is more likely true than not true or that a mitigating factor is more likely present than not present.

The defendant has alleged various mitigating factors in this case. Each of you must consider any mitigating factor you, as an individual, find has been established by a preponderance of the evidence that relates to any aspect of the defendant's character or background, any circumstance of the offense, or any other fact or circumstance, which you, as an individual, conclude indicates or tends to indicate that the defendant should not be sentenced to death.

Some of the mitigating factors that you must consider are the following, but remember you are not confined to only those mitigating factors hereinafter listed:

(1) that the defendant Louis Jones did not have a significant prior criminal record;

(2) that the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;

(3) that the defendant Louis Jones committed the offense under severe mental or emotional disturbance;

(4) that the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed);

(5) that the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army;

(6) that the defendant Louis Jones is likely to be a well-behaved inmate;

(7) that the defendant Louis Jones is remorseful for the crime he committed;

(8) that the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution;

(9) that the defendant Louis Jones was under unusual and substantially internally generated duress and stress at the time of the offense;

(10) that the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense;

(11) that other factors in the defendant's background or character mitigate against the death penalty.

You will also recall that I previously told you that all twelve of you had to unanimously agree that a particular aggravating circumstance was proved beyond a reasonable doubt before you consider it. Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member who finds by a preponderance of the evidence the existence of a mitigating factor may consider such factor established for his or her weighing of aggravating and mitigating factors regardless of the number of other jurors who agree that such mitigating factor has been established.

After you have completed your findings as to the existence or absence of any aggravating or mitigating factors, you will then engage in a weighing process. In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or nonstatutory – against any mitigating factors that any of you find to exist. You shall consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.

If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of

any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.

If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.

In reaching your findings about the aggravating and mitigating factors in this case, the instructions I gave you prior to your deliberations at the guilt phase about determinations of credibility issues apply equally here. In other words, you alone determine the credibility of the witnesses and the weight to give to this testimony and the other evidence. Also, in determining whether to recommend a death sentence, you must avoid any influence of passion or prejudice. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

The process of weighing aggravating and mitigating factors against each other or weighing aggravating factors alone, if there are no mitigating factors, in order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater; you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined. If so, you should recommend that a sentence of death not be imposed. Similarly, you may find that a particular aggravating factor outweighs all mitigating factors combined. If so, you may recommend that a sentence of death be imposed. You and you alone, are to decide what weight or value is to be given to a particular factor in your decision-making process.

In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

Government's Exhibit 10 has been identified as a typewritten transcript of an oral conversation which can be heard on the tape recording received in evidence. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript for the limited and secondary purpose of aiding you in following the content

of the conversation as you listen to the tape recording, and also to aid you in identifying the speakers.

However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so. Each of you must decide this remaining question for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to reexamine your own opinion, and to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with.

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim. You are not to recommend a sentence of death unless you have concluded that you would impose a sentence of death for the crime in question no matter what the race, color, religious beliefs, national

origin, or sex of either the defendant or the victim would have been.

To emphasize the importance of this consideration, when you retire to begin deliberations, you will be given decision forms which contain a certificate that must be signed by each juror. When you have reached a decision, each of you is to sign the certificate – but only if this is so – attesting that considerations of race, color, religious beliefs, national origin, or sex of the defendant or the victim were not involved in reaching your decision, and attesting that you would have imposed a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or the victim would have been.

As you retire to begin your deliberations, you will be provided with a form entitled "Special Findings" on which you should record your determinations as to the existence or non-existence of any aggravating factor. You will also be provided with four forms entitled "Decision Form A, B, C, and D" on which you will record your decision regarding your sentencing recommendation. The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find

that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not unanimously find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.

Decision Form D should be used if you recommend that some other lesser sentence should be imposed.

The first thing you should do is select a foreperson who may be the same one that served you during the quilt [sic] phase, or someone else. He or she will preside over your deliberations and will speak for you here in court.

If you should desire to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the marshal who will bring it to my attention.

I shall respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, with any message or question you might send, that you should not tell me your numerical division at that time.

It is proper again to add a final caution. Nothing that I have said in these instructions – and nothing that I have said or done during the trial – has been said or done to suggest to you what I think your decision should be. What decision should be is your exclusive duty and responsibility

November 2, 1995
Date

/s/ Illegible
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
v.	)	5:95-CR-047-C
LOUIS JONES	)	

SPECIAL FINDINGS FORM

(Filed Nov. 3, 1995)

I. PART ONE

CIRCUMSTANCES WITH REGARD TO THE INTENT OF THE DEFENDANT AS IT RELATES TO THE DEATH OF TRACIE JOY MCBRIDE

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that circumstance relating to the intent of the defendant beyond a reasonable doubt:

1(A). The defendant LOUIS JONES intentionally killed Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

1(B). The defendant LOUIS JONES intentionally inflicted serious bodily injury which resulted in the death of Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

Instructions: If you answered "NO" with respect to both of the questions relating to the intent of the defendant in Section I above, then stop your deliberations, fill out Decision Form A, and advise the court that you have reached a decision.

If you answered "YES" with respect to one or both of the questions relating to the intent of the defendant in Section I above, then continue your deliberations in accordance with the court's instructions and proceed to Part II which follows.

II. PART TWO

AGGRAVATING FACTORS

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that aggravating factor beyond a reasonable doubt:

2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

Instructions: If you answered "NO" with respect to all of the Aggravating Factors in Section II above, then stop your deliberations, fill out Decision Form A, and advise the court that you have reached a decision.

If you answered "YES" to at least one question relating to the intent of the defendant in Section I, and at least one aggravating factor in Section II, then continue your deliberations in accordance with the court's instructions and proceed to Section III which follows. Otherwise, fill out Decision Form A and advise the court that you have reached a decision.

III. PART THREE
NON-STATUTORY AGGRAVATING FACTORS

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that aggravating factor beyond a reasonable doubt:

3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

Instructions: Regardless of whether you answered "YES" or "NO" with respect to the Non-Statutory Aggravating Factors in Part III above, continue your deliberations in accordance with the court's instructions and proceed to Section IV which follows.

IV. PART FOUR
MITIGATING FACTORS

Instructions: For each of the following mitigating factors, you should indicate, in the space provided, the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence.

A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and *any member of the jury who finds the existence of a mitigating factor may consider such a factor established in considering whether or not a sentence of death shall be imposed,* regardless of the number of other jurors who concur that the factor has been established.

1. That the defendant Louis Jones did not have a significant prior criminal record.

Number of jurors who so find 6

2. That the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

Number of jurors who so find 2

3. That the defendant Louis Jones committed the offense under severe mental or emotional disturbance.

Number of jurors who so find 1

4. That the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed).

Number of jurors who so find 4

5. That the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army.

Number of jurors who so find 8

6. That the defendant Louis Jones is likely to be a well-behaved inmate.

Number of jurors who so find 3

7. That the defendant Louis Jones is remorseful for the crime he committed.

Number of jurors who so find 4

8. That the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution.

Number of jurors who so find 9

9. That the defendant Louis Jones was under unusual and substantially internally generated duress and stress at the time of the offense.

Number of jurors who so find 3

10. That the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense.

Number of jurors who so find 1

11. That other factors in the defendant's background or character mitigate against the death penalty.

Number of jurors who so find 0

The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors. If none, write "NONE" and line out the extra spaces with a large "X". If more space is needed, write "CONTINUED" and use the reverse side of this page.

12. /s/ Sandy Lane .

Number of jurors who so find 7

__. _____.

Number of jurors who so find X

__. _____.

Number of jurors who so find X

__. _____.

Number of jurors who so find X

Instructions: Before continuing, all jurors should sign below if this Special Findings Form accurately reflects the findings of the Jury as a whole to this point. You should then continue your deliberations in accordance with the court's instructions by filling out either Decision Form B recommending death, or Decision Form

C recommending a life sentence without the possibility of release, or Decision Form D recommending some other lesser sentence. After filling out the appropriate Decision Form, complete the document entitled "Certification", and advise the court that you have reached a decision.

SIGNATURE OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Christie Beauregard
/s/ Jean Tripp	(Charlotte)
FOREPERSON	/s/ Lucy Illegible

Date: November 3, 1995

DECISION FORM A

We the jury have determined that a sentence of death should not be imposed because the government has failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor.

_____

FOREPERSON

Date: November _____, 1995

DECISION FORM B

Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any

mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor or factors are themselves sufficient to justify a sentence of death, we recommend, by unanimous vote, that a sentence of death be imposed.

SIGNATURE OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Charlotte Beauregard
/s/ Jean Tripp	/s/ Lucy Illegible

FOREPERSON

Date: November 3, 1995

DECISION FORM C

We the jury recommend, by unanimous verdict, a sentence of life imprisonment without the possibility of release.

SIGNATURE OF JURORS

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FOREPERSON

Date: November ____, 1995

DECISION FORM D

We the jury recommend some other lesser sentence.

_____

FOREPERSON

Date: November ____, 1995

CERTIFICATION

By signing below, each juror certifies that, in considering whether a sentence of death is justified, consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decisions, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim would have been.

SIGNATURES OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Charlotte Beauregard
/s/ Jean Tripp	/s/ Lucy Illegible

FOREPERSON

Date: November 3, 1995

_____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Criminal No.
	)	5-95-CR-0047-C
LOUIS JONES,	)	
	)	
Defendant.	)	

MOTION FOR NEW TRIAL

(Filed Jan. 3, 1996)

The defendant, by counsel, pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution, Rule 33 of the Rules of Criminal Procedure, and the provisions of 18 U.S.C. 3591 *et seq.*, moves the court to grant a New Trial in the above styled cause.

In support of his motion, defendant states as follows:

The defendant was assessed a sentence of death on November 3, 1995. The Court has extended until January 3, 1995 the time for filing a Motion for New Trial.

Jury Misconduct

Based on the statements of the juror herein, the jury was exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment.

The misstatement related to an issue as to the need for unanimity in order to avoid the imposition of a "lesser sentence" as opposed to life without possibility of release.

A juror has informed counsel that lack of, and misunderstandings about, the jury instructions here played a critical role in the death verdict in this case. Attached hereto and incorporated herein is the affidavit of Daniel Salazar, Staff Investigator for the Federal Public Defender, who participated in an interview of a juror who contacted counsel following the trial. That juror stated in part as follows:

> They understood the instructions to mean that they had to be unanimous on both death and life without parole. The people who were 100% for the death penalty would not agree to sign off on the life without parole form.
>
> Based on her impressions it was apparent that during deliberations other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.
>
> She stated that there was considerable pressure in deliberations to prevent that outcome.
>
> She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release.

It is thus apparent that the fear that the court could impose a sentence of less than life without possibility of release if there was not a unanimous verdict was improperly used as leverage in overcoming the scruples of those jurors who reasonably felt that the appropriate punishment was life without release.

This critical misunderstanding violated the defendant's rights under the principles of *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) to have his sentence determined under accurate and reliable standards and in accordance with the requirements of the 5th, 6th, and 8th Amendments of the United States Constitution.

Error in the Court's charge

The jury misconduct alluded to above is all the more relevant because the defendant specifically and timely presented to the court a proposed instruction and objection which would have clarified this point for the jury. In his proposed instructions submitted on November 1, 1995, the defendant requested a charge as follows:

INSTRUCTION NO. 5

E. Unanimity Recruited Only for Death Sentence

This second phase of the trial differs from the first. In the first phase, I instructed you to deliberate with the goal of reaching a unanimous decision – one way or the other – as to whether the government had proved the defendants guilty beyond a reasonable doubt of the crime charged.

In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should be not less than Life Without Possibility of Release, you should report that vote to the court and the Court will sentence the defendant to Life Without the Possibility of Release.

Now, the defendant at this hearing does not have to present any evidence. He does not have to prove to you that he should be permitted to live. He was, however, entitled to present any mitigating facts to you – that is, facts that favor a lesser punishment than death – should he choose to do so. (emphasis added)

The court further erred by overruling the objections and failing to instruct the jury as to each and every objection and proposed instruction contained in the Tendered Penalty Phase Instructions filed on October 6, 1995, the Tendered Penalty Phase Mitigation Verdict Form filed November 1 1995, Defendant's Preliminary Objections to the Court's Charge filed November 1, 1995, and the Defendant's Requested Sentencing Instructions filed November 1, 1995.

As to each such objection and proposed instruction the defendant based his objection and request upon the provisions of the 5th, 6th, and 8th Amendments to the United States Constitution and the language and statutory intent of Federal Death Penalty Act of 1994.

* * *

Conclusion

The ~~sentence~~ of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

WHEREFORE, the defendant prays:

(a) That the Court grant a New Trial in this cause and set aside the sentence of death; and

(b) Grant an evidentiary hearing to resolve the issues set forth herein; and

(c) Such other relief as may be appropriate.

Respectfully submitted,

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal Public Defender
TBA #13740400
1205 Texas Avenue
Lubbock, Texas 79401
806-743-7236

/s/ Daniel W. Hurley by Illegible
Daniel W. Hurley
Hurley and Sowder
TBA #10310200
1703 Avenue K
Lubbock, Texas 79401
806-763-0409

CERTIFICATE OF CONFERENCE

I certify that I conferred with Tanya Pierce or Roger McRoberts, the Assistant U.S. Attorneys assigned to this matter, regarding the filing of the foregoing and they do ~~do not~~ oppose said motion.

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal Public Defender

[Certificate Of Service Omitted In Printing]

EX. "A"

AFFIDAVIT

I, DANIEL SALAZAR, do hereby state the following:

My name is DANIEL SALAZAR. I am employed as an Investigator for the Federal Public Defender.

On November 8, 1995, a juror in the Louis Jones case called the office of the Federal Public Defender. The caller identified herself as juror Christie Beauregard. With the consent of the juror, she was placed on speakerphone and Daniel Salazar and Carlton McLarty participated in the conversation.

The juror expressed misgivings about the verdict.

She said that she'd been the next to last to change her mind. She described the initial vote as eight to four for the death penalty. She said the main thing that bothered her was that there was a lot of confusion about the Court's instructions. On Friday afternoon they thought they would be hung because they were not able to reach a unanimous verdict. They understood the instructions to mean that they had to be unanimous on both death and life without parole. The people who were 100% for the death penalty would not agree to sign off on the life without parole form.

During deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.

She stated that there was considerable pressure in deliberations to prevent that outcome.

She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release.

They were taking secret ballots. When it got down to ten to two the other jurors asked who were the two that weren't voting for death and put them on the spot. She said that she hadn't decided. She thought that Louis would be okay in prison. But she also said that if she was the only one then she might change her mind but as long as there was someone else agreeing with her then she would not vote for the death penalty.

She said that at this point Cassandra Hastings, the lone black juror, began crying and stating that she could not impose the death penalty. Mrs. Beauregard then describes all the other jurors as "getting on her". That they were "pushing her hard" and that they were pressuring her until she finally said 'yes'. After that Mrs. Beauregard then changed her vote.

She said shortly before it reached this point they had almost decided it would be a hung jury and they were about to send a note out to the Judge asking for clarification about the instructions and what would happen if there was a hung jury. However, at this point the ten to two vote occurred and things went very fast from that point on.

She said some of the pro death jurors would have been willing and were willing to go along with life without possibility of release. She says that if the jury had known that if they were unable to reach a verdict between life without possibility of release and death that the Judge would have imposed a life without possibility of release sentence then she would not have agreed to vote for a death sentence. She believed other jurors shared that view.

/s/ Daniel Salazar
DANIEL SALAZAR

THE STATE OF TEXAS
COUNTY OF LUBBOCK

This instrument was acknowledged before me on Dec. 28, 1995 by DANIEL SALAZAR.

/s/ Dora M. Russell
Notary Public, State of Texas

[SEAL]
DORA M. RUSSELL
MY COMMISSION EXPIRES
October 20, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
v.	§	5:95-CR-047-C
	§	
LOUIS JONES	§	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

(Filed Jan. 26, 1996)

COMES NOW the United States of America, by and through the United States Attorney for the Northern District of Texas, in the above entitled cause and files this response to Defendant's Motion for New Trial filed January 3, 1996, and in support thereof would show this Court as follows:

I. THERE WAS NO JURY MISCONDUCT

The Defendant's first ground for new trial is an allegation of jury misconduct based on a telephone call with a juror which Defendant contends shows that the "jury was exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment."

The juror's alleged comments show no more than, at most, a misunderstanding of the Court's instructions, or confusion by the jury concerning the Court's instructions

as to the law. Such a misunderstanding or confusion is not grounds for review. See ***United States v. Arditti,*** 955 F.2d 331, 342 (5th Cir. 1992) (" . . . the affidavits of juror confusion are not relevant for our decision, as whether a jury misunderstands its instructions is not to be re-examined after the verdict.").

Here the juror's purported statements are classic examples of jury deliberations that are totally devoid of any representations of extrinsic or outside influences. As such, Rule 606(b)[1] prohibits a juror from testifying about the deliberative process:

> . . . the rule separately bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the

[1] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence or any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

> testifying juror's own mental process during the deliberations.

United States v. Ortiz, 942 F.2d 903, 913 (5th Cir. 1991), *cert. denied,* 504 U.S. 985, See also, ***United States v. Ruggiero,*** 56 F.3d 647, 652 (5th Cir. 1995), and cases cited therein. Here the juror's statements clearly relate to each of the four prohibited topics set out above. See also ***Tanner v. United States,*** 483 U.S. 107 (1987).

Contrary to Defendant's allegations, the juror's statements do not concern exposure to any extrinsic evidence. Extrinsic information under Rule 606(b) is "when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material could have affected the verdict.' " ***United States v. Hernandez-Escarsega,*** 886 F.2d 1560, 1561 (9th Cir. 1989). Here, the concerns expressed relate to the Court's instructions and the application of those instructions. "Rule 606(b) has consistently been used to bar testimony when the jury misunderstood instructions." ***United States v. Wickersham,*** 29 F.3d 191, 194 (5th Cir. 1994), and cases cited therein.

II. THE COURT'S CHARGE WAS CORRECT

The Defendant contends, in part based on the alleged statements of one juror, that the Court erred by not giving his requested jury instruction No. 5. This instruction includes the following:

> [If the jury did not unanimously agree on the death penalty] the jury **must** fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, **I will impose a sentence of life imprisonment without possibility of release.** In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and **I will impose a sentence of life imprisonment without possibility of release.**

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that sentence should be not less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release". (emphasis added)

The Court properly refused this instruction as it is confusing and not a correct statement of the law. On appeal, a case can be reversed for a district court's refusal to give a requested jury instruction only if the requested instruction was substantially correct. ***United States v. Laury,*** 49 F.3d 145, 152 (5th Cir. 1995); ***United States v. Tomblin,*** 46 F.3d 1369 (5th Cir. 1995). The trial judge has substantial latitude in formulating the jury charge, and the court's refusal to give a requested instruction is reviewed only for an abuse of discretion. ***Laury,*** 49 F.3d at 152.

It is very questionable that there was any misunderstanding or confusion concerning the instructions that were given. The Defendant is incorrect when alleging that a hung jury as to the death penalty would result in the Court's imposing a sentence of life imprisonment without

possibility of release. Under 18 U.S.C. 3593(e) and 3594, the jury's recommendation for death or life without possibility of release must be unanimous in order for mandatory imposition of either of those sentences. If the jury could not agree unanimously on either death or life without possibility of release, then the Court could impose a sentence of either life imprisonment with or without possibility of release. In this respect then, the jury was not confused nor did they misunderstand the instructions as alleged.

* * *

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons it is respectfully submitted that Defendant JONES' Motion for New Trial should be denied.

Respectfully submitted,

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ Tanya K. Pierce
TANYA K. PIERCE
ASSISTANT UNITED STATES ATTORNEY
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806/743-7351

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	NO. 5:95-CR-0047-C
v.	)	
LOUIS JONES	)	

ORDER

(Filed Jan. 29, 1996)

The Court has considered Defendant's Motion for New Trial and the Government's Response thereto. For the reasons set forth in the Government's Response, the Court **DENIES** the Defendant's Motion for New Trial.

SO ORDERED.

Dated this 29th day of January, 1996.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No.
vs.	)	5-95-CR-0047-C
LOUIS JONES,	)	
	)	
Defendant.	)	

MOTION TO RECONSIDER ORDER DENYING MOTION FOR NEW TRIAL

(Filed Jan. 30, 1996)

The Defendant, by counsel, pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution, Rule 33 of the Rules of Criminal Procedure, and the provisions of 18 U.S.C. 3591 *et seq.*, moves the court to reconsider the order denying the defendant's Motion for Trial entered on January 29, 1996 and grant a New Trial in the above styled cause.

In support of his motion, defendant states as follows:

The defendant was assessed a sentence of death on November 3, 1995. A Motion for New Trial was filed on January 3, 1996, and the Court signed an order denying same on January 29, 1996.

In response the to [sic] claims presented regarding jury misconduct and the Court's Charge, the government has taken the position that at most, a misunderstanding of the Court's instructions occurred, and that in any event, the Court's charge was correct.

As a matter of constitutional law under the 8th Amendment and the statutory construction of the Federal Death Penalty Act of 1994, a jury hung between Life without Possibility of Release and a sentence of Death but whose members unanimously reject the option of a lesser sentence, has in effect, reached a decision against the imposition of the death penalty. That is exactly what happened in this case. Juror Cassandra Hastings contacted counsel after the filing of the Motion for New Trial and has submitted an affidavit attached hereto as Exhibit A. This affidavit demonstrates that the jury was in fact exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment. As detailed by the juror, another specific juror reported incorrect extraneous information regarding the state of the law, informing the jury that if the jury was hung the court would in fact impose a lesser sentence that could result in the defendant being released from prison.

The jury thus sentenced the defendant to death based on the erroneous belief that failure to agree on a verdict could result in the imposition of a "lesser sentence" that would result in the defendant's release from prison. The Government concedes that the Court could only impose a sentence of "either life imprisonment with or without possibility of release." A life sentence under current federal law is without parole. Therefore, the defendant was harmed by unwarranted speculation regarding his possible release. The defendant's requested charge, if given by the Court, would have clarified this issue for the jury.

Based on the accounts of deliberations, it appears that the absence of instructions on this issue contributed significantly to the imposition of the death penalty.

Conclusion

The sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

WHEREFORE, the defendant prays:

(a) That the reconsider the order denying a New Trial and grant a New Trial in this cause and set aside the sentence of death; and

(b) Grant an evidentiary hearing to resolve the issues set forth herein; and

(c) Such other relief as may be appropriate.

Respectfully submitted,

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal
Public Defender
TBA #13740400
1205 Texas Avenue
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806-743-7236

/s/ Daniel Hurley by Carlton McLarty
Daniel W. Hurley
Hurley and Sowder
TBA #10310200
1703 Avenue K
Lubbock, Texas 79401
806-763-0409

"Ex. A"

STATE OF TEXAS *
* AFFIDAVIT
COUNTY OF LUBBOCK *

BEFORE ME, the undersigned authority, on this day personally appeared CASSANDRA HASTING, a credible person, of legal age, who, after being duly sworn by me on her oath states the following:

My name is Cassandra Hastings. I served as a juror in the trial of United States v. Louis Jones.

I have contacted the office of Dan Hurley, Attorney, in order to inform him of matters relating to the deliberations in the trial of Mr. Jones. I contacted Mr. Hurley's office after I heard news accounts of another jurors' statements about our deliberations. I discussed the case with Mr. Hurley, then I called him back again, and then I visited him at his office. This affidavit was prepared in his office and I have carefully reviewed it for accuracy.

During the course of our deliberations we were confused as to the meaning of the courts instructions. Initially, no one knew exactly what would happen if we were unable to reach a verdict. This issue came up on the first day of deliberations.

Once we reached the point in our deliberations where we discussing the punishment our initial vote was 8 to 4 for the death penalty. I was one of the jurors who did not want to impose a death sentence, but instead I favored Life without possibility of release. Many of the other jurors were willing to impose a Life without release

sentence. In fact, it is my recollection that all but three jurors were willing to vote to impose Life without release. However, the other three jurors were firm in their opposition to Life without release. It looked like we might have had a hung jury. At this point we again discussed the effect of a hung jury.

One of the men, I believe it was Mr. Carthel from Plainview, said that if we had a hung jury then the sentence would be left up to the judge and that Louis Jones would get the lesser sentence referred to in the last jury verdict form. People then brought up the possibility that Mr. Jones could be released from prison. No one wanted this to happen or even be possible.

I feel that a great deal of pressure was brought to bear on me to get me to change my vote. This pressure included the information that the judge would impose a lesser sentence than Life without release if we didn't reach a verdict.

I would not have changed my vote to a death sentence if I had known that a hung jury would not result in the defendant being released form prison at a later. I do not feel that the death sentence is the appropriate sentence in this case and I changed my vote because of the intense pressure from other jurors and the information that Mr. Jones would get a sentence that would result in his release from prison if we had a hung jury.

/s/ Cassandra Hastings
CASSANDRA HASTINGS

SUBSCRIBED AND SWORN TO before me by the said CASSANDRA HASTINGS on this the 19th day of January, 1996 to certify which witness my hand and seal of office.

/s/ Annabel Padilla
Notary Public,
Lubbock County, Texas

[SEAL] ANNABEL PADILLA
Notary Public, State of Texas
My Commission Expires 9-14-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	NO. 5-95-CR-0047-C
v.	)	
LOUIS JONES	)	

ORDER

(Filed Jan. 30, 1996)

The Court having considered Defendant's Motion to Reconsider Order Denying Motion for New Trial, filed January 30, 1996, is of the opinion that the same should be **DENIED.**

SO ORDERED.

Dated This 30th day of January, 1996.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States
District Judge

REVISED, February 10, 1998

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-10113 and No. 96-10448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LOUIS JONES, JR.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

January 5, 1998

Before POLITZ, Chief Judge, and BENAVIDES and PARKER, Circuit Judges. Robert M. Parker, Circuit Judge:

The defendant, Louis Jones, appeals from a conviction of kidnapping with death resulting, in violation of 18 U.S.C. § 1201. After a post-conviction sentencing hearing, the jury recommended the death penalty. The defendant challenges the sentence of death imposed by the court pursuant to the Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591-97. After considering all the issues raised by the defendant on appeal, we affirm both the conviction and the sentence of death.

I. Background

On February 18, 1995, Pvt. Tracie Joy McBride was abducted at gunpoint from Goodfellow Air Force Base. During the abduction, Pvt. Michael Peacock was assaulted by McBride's attacker and severely injured while attempting to aid McBride. The base launched an intense investigation into the abduction of McBride.

On March 1, 1995, Sgt. Sandra Lane informed investigators of the Office of the Air Force Special Investigations ("OSI"), who were investigating the abduction of Pvt. McBride, that her ex-husband, Louis Jones, had attacked her on February 16, 1995, two days before McBride's disappearance. After convincing Lane to file a complaint, the OSI investigators summoned San Angelo Police who took a sworn statement from Lane. An arrest warrant was issued for Jones based on the statement made by Lane. Jones was arrested later that evening.

While in state custody for the abduction and sexual assault of Sandra Lane, investigators from the OSI questioned Jones as a possible suspect in the abduction of Pvt. McBride. The OSI investigators advised Jones of his Miranda rights, but Jones indicated that he did not want an attorney and that he was willing to answer questions. In response to questioning by OSI investigators, Jones gave a written statement admitting to the abduction and murder of McBride. In his statement, Jones admitted to taking McBride back to his apartment, tying her up, and placing her in the closet. Jones stated that he then drove McBride to a remote location where he repeatedly struck her over the head with a tire iron until she was dead. Although Jones could not give investigators directions to where the

body was located, he indicated that he could show them. Subsequently, Jones lead law enforcement officials to a bridge located twenty miles outside San Angelo under which the body of Tracie McBride was discovered. An autopsy revealed that McBride died due to blunt force trauma to the head. The autopsy also revealed evidence of sexual assault.

Louis Jones was indicted in an instrument that charged him with kidnapping McBride with her death resulting, in violation of 18 U.S.C. § 1201(a)(2). The government alleged that the offense occurred within the special maritime and territorial jurisdiction of the United States. Conviction for kidnapping with death resulting under the Federal Kidnapping Statute, 18 U.S.C. § 1201, could result in a sentence of life imprisonment or death. Exercising the discretion granted by the Federal Death Penalty Act, the United States Attorney prosecuting the case decided to seek the death penalty. As required by 18 U.S.C. § 3593(a), the prosecution filed its Notice of Intent to Seek the Death Penalty. The jury trial commenced on October 16, 1995 and resulted in a guilty verdict on October 23, 1995.

Following Jones's conviction, a separate sentencing hearing was conducted to determine whether Jones would receive a sentence of death. *See* 18 U.S.C. § 3593. To obtain a sentence of death, the government had the burden of proving the following: the death of McBride was an intentional killing; and the existence of one or more aggravating factors make the defendant death-eligible. 18 U.S.C. § 3591(a). In the first stage of the sentencing hearing, the jury was required to determine whether Louis Jones intentionally caused the death of Tracie

McBride. 18 U.S.C. § 3591(a). Regarding the intent element, the jury unanimously found: (1) Jones intentionally killed McBride; and (2) Jones intentionally inflicted seriously bodily injury that resulted in the death of McBride.

The second stage of the sentencing hearing required the jury to weigh any aggravating factors against any mitigating factors to determine whether a sentence of death was appropriate. 18 U.S.C. § 3593(e). The government, in its notice of intent to seek the death penalty, set forth four statutory aggravating factors[1] and three non-statutory aggravating factors.[2] In order to consider an

---

[1] The government alleged the following four statutory aggravating factors:

> (1) the defendant caused the death or injury resulting in the death of Tracie Joy McBride during the commission of the offense of kidnapping;
>
> (2) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride;
>
> (3) the defendant committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride; and
>
> (4) the defendant committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride.

[2] The three non-statutory aggravating factors are as follows:

(1) the defendant's future dangerousness to the lives and safety of other persons;

aggravating factor, the jury must unanimously find that the government established the existence of an aggravating factor beyond a reasonable doubt. 18 U.S.C. § 3593(c). The jury made unanimous findings regarding the following two statutory factors: Jones caused the death of the victim or the injury resulting in the death of the victim during the commission of the offense of kidnapping; and Jones committed the offense in an especially heinous, cruel, and depraved manner. The jury also made unanimous findings regarding the following two non-statutory aggravating factors: McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and McBride's personal characteristics and the effect of the offense on her family.

Once the jury found aggravating factors to exist, the jury next had to determine whether any mitigating factors existed. To consider a mitigating factor in jury deliberations, only one juror must find that the defendant established the existence of a mitigating factor by a preponderance of the evidence. Of the eleven mitigating factors proposed by the defendant, ten mitigating factors were found to exist by at least one or more jurors.[3] In

---

(2) Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and

(3) Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family.

[3] The defendant proposed eleven mitigating factors, ten of which were found to exist by one or more jurors (the number of jurors finding each mitigating factor is enclosed in brackets):

deliberations, the jury was asked to weigh the aggravating factors against any mitigating factors to determine

---

(1) the defendant Louis Jones did not have a significant prior criminal record [6];

(2) the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of the law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge [2];

(3) the defendant committed the offense under severe mental or emotional disturbance [1];

(4) the defendant was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) [4];

(5) the defendant served his country well in Desert Storm, Grenada, and for 22 years in the United States Army [8];

(6) the defendant is likely to be a well-behaved inmate [3];

(7) the defendant is remorseful for the crime he committed [4];

(8) the defendant's daughter will be harmed by the emotional trauma of her father's execution [9];

(9) the defendant was under unusual and substantial internally generated duress and stress at the time of the offense [3];

(10) the defendant suffered from numerous neurological or psychological disorders at the time of the offense [1]; and

(11) other factors in the defendant's background or character militate against the death penalty [0].

Additionally, seven jurors added Jone's ex-wife Sandra Lane as a mitigating factor.

the propriety of a death sentence. The jury returned a unanimous verdict recommending death on November 3, 1995.

II. Constitutionality of Federal Death Penalty Act

The defendant challenges the constitutionality of the Federal Death Penalty Act, 18 U.S.C. §§ 3591-97, on the following four grounds: (1) the prosecutor's ability to define non-statutory aggravating factors amounts to an unconstitutional delegation of legislative power; (2) the lack of proportionality review combined with prosecutor's unrestrained authority to allege non-statutory aggravating factors renders the statute unconstitutional; (3) the relaxed evidentiary standard at the sentencing hearing combined with the unrestrained use of non-statutory aggravating factors renders the jury's recommendation arbitrary; and (4) the death penalty is unconstitutional under all circumstances. We review constitutional challenges to federal statutes de novo. *United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997).

A.

First, the defendant asserts that the prosecutor's authority to define non-statutory aggravating factors results from an unconstitutional delegation of legislative power. The nondelegation doctrine arises from the constitutional principle of separation of powers, specifically Article 1, § 1, which provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." *See Touby v. United States*, 500 U.S. 160, 165 (1991);

United States v. Mistretta, 488 U.S. 361, 371 (1989). Under the nondelegation doctrine, Congress may not constitutionally delegate its legislative power to another branch of government. *See Mistretta*, 488 U.S. at 372. Congress, however, may seek assistance, within limits, from coordinate branches of government. *See id.* So long as Congress formulates "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*

Jones asserts that Congress failed to formulate an "intelligible principle" in § 3592(c) when it delegated the authority to define additional aggravating factors to the Department of Justice.[4] On the contrary, the delegated authority is sufficiently circumscribed by "intelligible principles" to avoid violating the nondelegation doctrine. *See United States v. Tipton*, 90 F.3d 861, 895 (4th Cir. 1996). The authority to define nonstatutory aggravating factors falls squarely within the Executive's broad prosecutorial discretion, much like the power to decide whether to prosecute an individual for a particular crime. *See United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 1486 (1996)(noting the prosecutor's broad discretion in deciding whether to prosecute); *United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996) (stating that "[a] prosecutor has broad discretion during pretrial proceedings to determine

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[4] In reviewing similar challenges to the death penalty provisions of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e), two other circuits rejected this argument. *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1966); *United States v. Tipton*, 90 F.3d 861, 895 (4th Cir. 1996).

the extent of the societal interest in prosecution.") Obviously, Congress could not list every possible aggravating factor. An exclusive list of factors would bind the hands of the prosecutor in deciding whether to pursue the death penalty.

Nevertheless, the prosecution does not have *carte blanche* in devising non-statutory aggravating factors. At least four limitations guide the prosecution in exercising its delegated authority. First, the statute limits the scope of aggravating factors to those for which prior notice has been given by the prosecution.[5] *See* 18 U.S.C. § 3593(a). Second, the death penalty jurisprudence devised by the Supreme Court guides the prosecution in formulating nonstatutory aggravating factors. For example, due process requires that information submitted as aggravating genuinely narrow the class of persons eligible for the death penalty. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983). Third, the district court functions as a gatekeeper to limit the admission of useless and impermissibly prejudicial information. *See* 18 U.S.C. § 3593(c). And fourth, the requirement that the jury find at least one statutory aggravating factor beyond a reasonable doubt before it may consider the non-statutory factors further limits the delegated authority. *See* 18 U.S.C. § 3593(d). The requirement of at least one statutory aggravating factor secures sufficient Congressional guidance in classifying death-

[5] Section 3592(c) allows the jury to consider "whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(c).

eligible offenders. Consequently, these limitations provide the prosecution with an "intelligible principle" so that an unconstitutional delegation does not occur.

B.

Second, the defendant argues the lack of proportionality review combined with the prosecutor's unrestrained authority to allege non-statutory aggravating factors renders the statute unconstitutional. Proportionality review examines the appropriateness of a sentence for a particular crime by comparing the gravity of the offense and the severity of the penalty with sentencing practices in other prosecutions for similar offenses. *See Pulley v. Harris*, 465 U.S. 37, 43 (1984). Although the Court has upheld capital sentencing schemes requiring proportionality review, the Court has never required such review as constitutionally mandated. *See Gregg v. Georgia*, 428 U.S. 153, 204-05 (1976) (plurality opinion) (noting the benefits of proportionality review as a means of preventing arbitrary death sentences, but not mandating such review). *See also Pulley*, 465 U.S. at 44-45 ("that some [capital sentencing] schemes providing proportionality review are constitutional does not mean that such review is indispensable"). Thus, the Constitution does not require comparative proportionality review in every capital case, but only that the death penalty not be imposed arbitrarily or capriciously. *See Pulley*, 465 at 49-50.

The FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review. *See id.* at 880. The FDPA bifurcates the penalty phase from guilt determination. During

the penalty phase, the jury must first determine whether the defendant intentionally killed the victim, or intentionally committed or participated in an act that resulted in the death of the victim. 18 U.S.C. § 3591(a). Then the jury must make a finding, beyond a reasonable doubt, of the existence of any aggravating factor or factors enumerated in § 3592(c). After finding the existence of at least one statutory aggravating factor, the jury may consider the existence of nonstatutory aggravating factors for which notice has been given by the government. *See* 18 U.S.C. § 3593(d). Individual jurors must then consider evidence of any mitigating factor that he or she has found to exist by a preponderance of the evidence. Prior to imposing a sentence of death, the jurors must conclude that evidence of the aggravating factors unanimously found to exist beyond a reasonable doubt, both statutory and nonstatutory, outweighs the mitigating factors any individual juror has found to exist by a preponderance of the evidence. Additionally, the statute provides for appellate review to determine whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. 18 U.S.C. § 3595.

Jones argues that the Constitution requires proportionality review when the capital sentencing procedure allows the jury to consider nonstatutory aggravating factors because of the danger that the death penalty will be imposed arbitrarily, capriciously, or freakishly. As long as the statute prevents an arbitrary death sentence, the inclusion of relevant nonstatutory aggravating factors at the sentencing stage does not render the death penalty scheme unconstitutional. *See Barclay v. Florida*, 463 U.S. 939, 957 (1983) (citing *Zant v. Stephens*, 462 U.S. 862,

878-89 (1983)). The FDPA provides sufficient safeguards to prevent the arbitrary imposition of the death penalty. First, the legislature designed a narrow statute by applying the death penalty to a limited number of criminal offenses.[6] *See* 18 U.S.C. § 3591. Second, the statute further narrows the class of persons eligible for the death penalty by requiring a finding of at least one statutory aggravating factor. *See* 18 U.S.C. § 3593(d). And third, the statute provides for appellate review to determine whether the evidence supports the special finding of an aggravating factor and to ensure that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. *See* 18 U.S.C. § 3595. Consequently, we hold that the Constitution does not mandate proportionality review when the capital sentencing scheme permits the jury to consider nonstatutory aggravating factors as long as the statute provides for other safeguards against an arbitrary imposition of the death penalty.

C.

Third, Jones argues that the relaxed evidentiary standard at the sentencing hearing combined with the unrestrained use of non-statutory aggravating factors renders the jury's recommendation arbitrary and unreliable. The Federal Death Penalty Act provides for a relaxed evidentiary standard during the sentencing hearing in order to

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[6] A defendant may be sentenced to death if convicted of the following offenses: espionage, 18 U.S.C. § 794; treason, 18 U.S.C. § 2381; or intentionally murdering or causing the death of a person during the commission of certain crimes, see, e.g., kidnapping with death resulting, 18 U.S.C. § 1201.

give the jury an opportunity to hear all relevant and reliable information, unrestrained by the Federal Rules of Evidence. The FDPA provides:

> The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death.

18 U.S.C. § 3593(c). Therefore, the defendant and the government may introduce any relevant information during the sentencing hearing limited by the caveat that such information be relevant, reliable, and its probative value must outweigh the danger of unfair prejudice.[7]

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[7] The relevancy standard enunciated in § 3593(c) actually excludes a greater amount of prejudicial information than the Federal Rules of Evidence because it permits the judge to exclude information where the "probative value is outweighed by the danger of creating unfair prejudice" rather than "substantially outweighed." *See* Fed. R. Evid. 403. *See also* Anti-Drug Abuse Act, 21 U.S.C. § 848(j) (codifying Fed. R. Evid. 403 standard of "substantially outweighs").

Although the Eighth Amendment requires a heightened reliability standard in capital sentencing proceedings, the jury must also receive sufficient information regarding the defendant and the offense in order to make an individual sentencing determination. *See Lowenfield v. Phelps*, 484 U.S. 231, 238-239 (1988) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The Court has recognized that the defendant must be given the opportunity to introduce information regarding mitigating factors, without traditional evidentiary restraints, in order to provide the jury with the fullest possible information about the defendant. *See Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."). *See also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (stating that it is "essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine"). Although the sentencing hearing will not be governed by traditional evidentiary restraints, the district court will prevent the evidentiary free-for-all prophesied by Jones by excluding unfairly prejudicial information under the standard enunciated in § 3593(c). Consequently, the relaxed evidentiary standard does not impair the reliability or relevance of information at capital sentencing hearings, but helps to accomplish the individualized sentencing required by the constitution. *See*

United States v. Nguyen, 928 F.Supp. 1525, 1546-47 (D.Kan. 1996).

D.

Finally, the defendant argues that the death penalty is unconstitutional under all circumstances. We are bound by Supreme Court precedent which forecloses any argument that the death penalty violates the Constitution under all circumstance. *See McCleskey v. Kemp*, 481 U.S. 279, 300-03 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976).

III. Jury Instructions

A.

The defendant claims that the district court erred by failing to give the defendant's requested instructions. We review the district court's refusal to give a requested instruction for abuse of discretion. *See United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994). A refusal to give a requested instruction is reversible error only if the proposed instruction was (1) substantively correct, (2) not substantively covered in the jury charge, and (3) concerned an important issue in the trial, such that failure to give the requested instruction seriously impaired the presentation of a defense. *Id.*

The actual jury instructions given by the district court repeated the sentencing options available under the FDPA. The instructions traced 18 U.S.C. § 3593(e) by informing the jury that it could recommend death, life without the possibility of release, or some lesser sentence. The defendant, however, contends that the jury should

have been instructed that a failure to reach a unanimous verdict recommending the death penalty would result in the court automatically imposing a sentence of life without the possibility of release.[8] The defendant's proposed instructions were not substantively correct because the proposed instructions informed the jury that the failure to return a unanimous verdict would result in an automatic sentence of life without the possibility of release. Such is not the case under § 3593, which requires unanimity for every sentence rendered by the jury regardless of whether the verdict is death, life without the possibility of release, or, if possible under the substantive criminal statute, any other lesser sentence. Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered. As such, a second

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[8] The defense proposed two jury instructions regarding the unanimity requirement. Requested instruction number five, entitled "Unanimity Required Only for Death Sentence," provided in relevant part as follows:

> In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.

The defense's requested jury instruction number four provided in relevant part as follows:

> If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones's punishment at life in prison without the possibility of release.

sentencing hearing would have to be held in front of a second jury impaneled for that purpose. *See* 18 U.S.C. § 3593(b)(2)(C). Therefore, the district court did not err by refusing to give the defendant's requested instructions because such instructions were not substantively correct.

B.

Additionally, the defendant contends that the district court committed reversible error with the instructions actually given for the following two reasons: First, Jones argues that the instructions actually given by the district court caused the jurors to recommend the death penalty under the false impression that the failure to reach a unanimous verdict would automatically result in the imposition of some lesser sentence. Second, Jones argues that the instructions incorrectly informed the jury they had the option of recommending some lesser sentence, in addition to the death penalty or life imprisonment options. Thus, the defendant claims that the instruction resulted in an arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment and Due Process.

We review all alleged errors in jury instructions for abuse of discretion. *United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994). A conviction will not be reversed unless the jury instructions, when viewed in their entirety, failed to correctly state the law. *See United States v. Flores*, 63 F.3d 1342, 1374 (5th Cir. 1995). Thus, even if a portion of the jury instructions are not technically perfect, the district court's instructions will be affirmed on appeal if the charge in its entirety presents the jury with a

reasonably accurate picture of the law. *See id.* (citing *United States v. Branch*, 46 F.3d 440, 442 n. 2 (5th Cir. 1995)). The district court will be reversed, however, if the interpretation urged by the appellant is one that a "reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form[s] employed in this case." *Id.* at 175 (citing *Mills v. Maryland*, 486 U.S. 367, 375-76 (1988)).

If the defendant did not object below, we review for plain error. *See Flores*, 63 F.3d at 1374 (citing *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994)). Under the plain error standard, there must be an error that is plain and that affects substantial rights. *See* Fed. R. Crim. P. 52(b). *See also United States v. Olano*, 507 U.S. 725, 731 (1993) (explaining plain error standard). Thus, an appellate court may correct a plain error only if it meets the following criteria: (1) there must be an error, which is defined as a deviation from a legal rule in the absence of a valid waiver; (2) the error must be clear or obvious error under current law; and (3) the error must have been prejudicial or affected the outcome of the district court proceedings. *See Olano*, 507 U.S. at 732-35; *United States v. Dupre*, 117 F.3d 810, 816 (5th Cir. 1997); *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc). Additionally, an appellate court has discretion in deciding whether to correct a plain error. *See Olano*, 507 U.S. at 735-36. Such discretion should not be exercised unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citing *United States v. Young*, 470 U.S. 1, 15 (1985)).

The district court instructed the jury as follows:

> After you have completed your findings as to the existence or absence of any aggravating or mitigating factors, you will then engage in a weighing process. In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or non-statutory – against any mitigating factors that any of you find to exist. You shall consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. *Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.*
>
> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.
>
> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.
>
> . . . .
>
> In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

i.

We must first decide whether the instructions given by the district court could have led a reasonable jury to believe that the court would automatically impose some lesser sentence if the jury failed to reach a unanimous verdict, as alleged by the defendant. As we have previously stated, § 3593(e) requires the jury to return a unanimous verdict regardless of whether the jury recommends death, life without the possibility of release, or some other lesser sentence. In arguing that the jury instructions and verdict forms caused the jury confusion, the defendant points to the following: (1) the district court did not repeat the unanimity requirement each time the court

mentioned the lesser sentence option in the instruction; (2) decision forms B and C, which recommended the death sentence and life imprisonment without the possibility of release, required the signature of all twelve jurors, while decision form D which recommended a lesser sentence only required the signature of the foreman; (3) the court erred by declining to instruct the jury on the effect of the failure to arrive at a unanimous decision; and (4) after the sentencing hearing, two jurors gave statements to defense attorneys attesting to the confusion caused by the jury instructions.

Regarding the district court's failure to repeat the unanimity requirement each time the court mentioned the lesser sentence option, the instructions could not have led a reasonable jury to conclude that non-unanimity would result in the imposition of a lesser sentence. *See Flores*, 63 F.3d at 1375. Reading the instructions in their entirety, the court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement.

Additionally, the defendant argues that the disparity of the verdict forms caused the jury to assume that non-unanimity would result in a lesser sentence because form D only required the signature of the jury foreperson, when forms B and C required all twelve juror signatures. The defendant did not object to the format of the verdict forms; therefore, we review for plain error. *See Flores*, 63 F.3d at 1374. Although the verdict forms standing alone could have persuaded a jury to conclude that unanimity

was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction. Consequently, we hold that no error occurred.

Next, Jones argues that the failure to instruct the jury of the consequences of not reaching a unanimous verdict resulted in a violation of the Eight [sic] Amendment proscription against cruel, unusual, and excessive punishment. Jones requested, but was denied, an instruction on the failure to arrive at a unanimous decision. Jones points to *State v. Williams*, 392 So.2d 619 (La. 1980), where the Louisiana Supreme Court held that juries must be informed of the consequences of failing to achieve a unanimous verdict. The defendant does not persuade us by invoking *Williams* because the Louisiana death penalty act, under which Williams was sentenced, expressly provided that life imprisonment resulted when the jury could not unanimously agree on the death penalty. Unlike the Louisiana statute, the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results. *See* 18 U.S.C. § 3593(e). Although the use of instructions to inform the jury of the consequences of a hung jury have been affirmed, federal courts have never been affirmatively required to give such instructions. *See Allen v. United States*, 164 U.S. 492, 501-02 (1896) (upholding the use of supplemental instructions to inform the jury of the effect of a hung jury); *United States v. Sutherland*, 463 F.2d 641, 648 (5th Cir. 1972) (allowing use of *Allen* charge). Consequently, we hold that no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict.

Finally, the defendant attempts to prove the instructions caused jury confusion through the use of juror affidavits. Following the sentencing hearing, two jurors initiated communications with defense attorneys in which the jurors referred to alleged confusion caused by the instructions regarding the unanimity requirement.[9] Jones cannot utilize juror affidavits to undermine the jury verdict. *See* Fed. R. Evid. 606(b); *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995). Federal Rule of Evidence 606(b) bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during the deliberations. *See Ruggiero*, 56 F.3d at 652. Under the rule, a juror may only testify to extraneous forces which influence jury deliberations. *See Tanner v. United States*, 483 U.S. 107, 121 (1987) (juror use of alcohol and drugs not extraneous influence on jury deliberations). Allegations of jury confusion caused by jury instructions would not be an outside influence about

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[9] Juror Christie Beauregard called the office of the Federal Public Defender and spoke with attorney Carlton McLarty and investigator Daniel Salazar. Mr. Salazar executed an affidavit detailing the conversation he had with Ms. Beauregard in which she stated that she was pressured into changing her vote by other jurors who believed that the court would impose a lesser sentence if the jury did not reach a unanimous verdict.

Juror Cassandra Hastings contacted defense attorney Daniel Hurley. Ms. Hastings executed an affidavit stating that she changed her vote to death under the mistaken belief that if the jury could not reach a unanimous decision, then the court would impose a lesser sentence.

which a juror could competently testify. *See Peveto v. Sears Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987). An "outside influence" refers to a factor originating outside of normal courtroom proceedings which influences jury deliberations, such as a statement made by a bailiff to the jury or a threat against a juror. *Id.* (citing Fed. R. Evid. 606(b) Advisory Committee Note and Judiciary Committee Note). Rule 606(b) has consistently been used to bar testimony when the jury misunderstood instructions. *See, e.g., Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989) (holding that juror testimony regarding misunderstanding of instructions prohibited by rule 606(b)). The defendant argues that the inapplicability of the Federal Rules of Evidence during sentencing hearings precludes the use of Rule 606(b) to bar juror affidavits impeaching the sentence. *See* 18 U.S.C. § 3593(c). The reasons for not allowing jurors to undermine verdicts in jury trials, however, apply with equal force to sentencing hearings. *See Silagy v. Peters*, 905 F.2d 986, 1009 (7th Cir. 1990) (holding that a juror's statements could not be used in a habeas corpus proceeding to impeach the jury's sentencing determination). Noting that the Eighth Amendment requires a "greater degree of reliability when the death sentence is imposed," we are convinced that Rule 606(b) does not harm but helps guarantee the reliability of jury determinations in death penalty cases. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating that the qualitative difference with the death penalty requires a greater degree of reliability).

Jury deliberations entail delicate negotiations where majority jurors try to sway dissenting jurors in order to reach certain verdicts or sentences. An individual juror

no longer exposed to the dynamic offered by jury deliberations often may question his vote once the jury has been dismissed. Such self-doubt would be expected once extrinsic influences bear down on the former jurors, especially in decisions of life and death. When polled, each juror affirmatively indicated that he had voted for the death penalty. We will not allow a juror to change his mind after the jury has rendered a verdict. In this situation, the outcome could just as easily have turned out the other way with the jurors not supporting the death sentence convincing the death-prone jurors to impose life without the possibility of release. If the jury truly feared that the district court would impose some lesser sentence in the absence of a unanimous recommendation, then the jury had the option of imposing life without the possibility of release. Furthermore, the jury never sought a clarifying instruction to remedy the alleged confusion. Consequently, the affidavits do not convince us that the instructions given by the district court could lead a reasonable jury to believe that the failure to reach a unanimous decision would result in the imposition of a lesser sentence.

ii.

Additionally, the defendant contends that the district court erred because the instructions misinformed the jury that three sentencing options were available, when in fact only two sentencing options existed under the substantive criminal statute – death and life imprisonment. *See* 18 U.S.C. § 1201. When a statute allows the jury to exercise sentencing powers, due process requires that a jury must be informed of all available sentencing options. *See Hicks*

v. Oklahoma, 447 U.S. 343, 346 (1980). At Jones' sentencing hearing the district court informed the jury of the three sentencing options available under § 3593 of the federal death penalty provisions rather than limiting the instructions to the two sentencing options available under § 1201, the substantive criminal statute for which the defendant was convicted. The defendant did not object to the inclusion of the "lesser sentence" option below; therefore, we review for plain error.[10] *See Flores*, 63 F.3d at 1374.

We must first determine whether the district court committed error by instructing the jury of the sentencing options available under § 3593, rather than limiting the instructions to the two sentencing options which existed under the substantive criminal statute. *See Olano*, 507 U.S. at 732-33. If any error occurred regarding the available sentencing options, the error was caused by the disparate sentencing options provided for in the Federal Kidnapping statute, 18 U.S.C. § 1201, and the Federal Death

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[10] At the charge conference, and in written objections, the defendant objected to the court's refusal to include the language "rather than a sentence of life imprisonment without the possibility of release or a lesser sentence" whenever the instructions referred to the jury's responsibility to determine whether the defendant should be sentenced to death. If the district court had actually used the defendant's requested instruction, then we would review under the invited error doctrine. *See United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991). The district court, however, did not use the defendant's requested language. Furthermore, the defendant did not object to other references in the instructions to the "lesser sentence" option. Consequently, we review for plain error.

Penalty Act, 18 U.S.C. § 3593(e)(3). Under § 1201, a defendant convicted of kidnapping with the death of the victim resulting shall be punished by death or life imprisonment. *See* 18 U.S.C. § 1201. Under the federal death penalty provisions, however, the jury may recommend that the court sentence the defendant to death, to life imprisonment without the possibility of release, or some other lesser sentence, upon the unanimous recommendation of the jury. *See* 18 U.S.C. § 3593(e).

The defendant argues that the language of the kidnapping statute clearly limits the possible sentences to death or life imprisonment. Moreover, the defendant argues that the term "life imprisonment" in the kidnapping statute actually means life without the possibility of release because parole no longer exists in the federal system. Thus, the jury actually had only two sentencing options – death or life without the possibility of release. Conversely, the government argues that the jury in fact had three options because Congress distinguishes between "life" and "life without the possibility of release." The government raises § 3594 as an example of the qualitative difference between life and life without the possibility of release. Section 3594 states that if the jury recommends a lesser sentence, then "the court shall impose any lesser sentence that is authorized by law. . . . if the maximum term of imprisonment is life imprisonment, the court may impose a sentence of life imprisonment without the possibility of release." 18 U.S.C. § 3594. Thus, the government argues that the jury in fact had the option of recommending death, life without the possibility of release, or a lesser sentence, but the district court

was obligated to impose life without the possibility of release as the only "lesser sentence" authorized by law.

In deciding whether the FDPA or § 1201 provides the appropriate sentencing options, we must first determine what effect the death penalty scheme has on the substantive criminal law. The FDPA acts like a sentence enhancement provision in that it does not add to or otherwise affect the penalties available under the substantive criminal statutes. *See United States v. Branch*, 91 F.3d 699, 738-40 (5th Cir. 1996) (holding that 18 U.S.C. § 924(c) does not create separate offense). Although the FDPA does not function exactly as a sentence enhancement provision, we will utilize the sentence enhancement analysis in order to determine the effect of the death penalty provisions on the substantive criminal law. In determining whether a statute creates a separate offense or is merely a sentence enhancement provision, the court has suggested the following four factors: (1) whether the statute predicates punishment upon conviction under another section; (2) whether the statute multiplies the penalty received under another section; (3) whether the statute provides guidelines for the sentencing hearing; and (4) whether the statute is titled as a sentencing provision. *Id.* at 738 (citing *United States v. Jackson*, 891 F.2d 1151, 1152 (5th Cir. 1989)). These factors complement traditional tools of statutory interpretation, namely, the text and legislative history. *Id.* at 738. As with the sentence enhancement provisions applicable to the use of a firearm during the commission of a drug crime, the FDPA does not create a separate and independent offense, but depends upon a conviction under another section. *See Branch*, 91 F.3d at

738. Additionally, the death penalty statute merely provides guidelines and procedures for the sentencing hearing. Nothing in the text or legislative history indicates that Congress intended to create new, separate offenses under the death penalty scheme.[11]

Although all three sentencing options were available to the jury under § 3593, the defendant could only receive death or life imprisonment under § 1201, the substantive criminal statute for which Jones was convicted. Contrary to the government's assertion, no meaningful distinction exists between "life" and "life without the possibility of release." Thus, had the jury recommended some lesser sentence, the court would have been obligated to impose life without the possibility of release as the only authorized lesser sentence. Because the substantive criminal statute takes precedence over the death penalty sentencing provisions, the district court should have instructed the jury of the sentencing options available under § 1201. Consequently, the district court committed error by informing the jury of the lesser sentence option available under § 3593.

After determining that error occurred, we must next determine whether the error was clear or obvious error under current law. *See Olano*, 507 U.S. at 734; *Dupre*, 117 F.3d at 817. Prior to this appeal, the death penalty sentencing provisions under which Jones was sentenced had never been reviewed on appeal. No clearly established

[11] The legislative history also supports a holding that § 3593 was intended to create procedures for imposing the death penalty rather than create additional substantive crimes. *See* House Report No. 103-467, 103rd Cong., 2d Sess. (1994).

law answered the question of whether § 3593 or the substantive criminal statute under which the defendant is convicted provides the correct sentencing options. The error was not so obvious, clear, readily apparent, or conspicuous that the judge was derelict by not recognizing the error. Consequently, we hold that instructing the jury as to the sentencing options available under § 3593 was not plain error.

IV. Statutory Aggravating Factors

The defendant argues that the district court committed reversible error by submitting statutory aggravating factors to the jury which failed genuinely to narrow or channel the jury's discretion. The government submitted four statutory aggravating factors to the jury during the penalty phase of the trial. The jury made unanimous findings regarding two statutory aggravating factors.

A.

Jones argues that the inclusion of statutory aggravating factor 2(A), which merely repeated the elements of the crime, did nothing to narrow the jury's discretion, and thus, violated the Eighth Amendment. Statutory aggravating factor 2(A), based on § 3592(c)(1), provides: "The defendant Louis Jones caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping."

As stated previously, a capital sentencing scheme must genuinely narrow the class of persons eligible for

the death penalty. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The use of aggravating factors helps to narrow the class of death-eligible persons and thereby channels the jury's discretion. *See Lowenfield v. Phelps*, 484 U.S. 231, 244 (1987). An aggravating factor which merely repeats an element of the crime passes constitutional muster as long as it narrows the jury's discretion. *See id.* at 246. In *Lowenfield*, the Court held that the constitutionally required narrowing function in a capital punishment regime could be performed in either of two ways: "The legislature may itself narrow the definition of capital offenses, . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246. Thus, the requisite narrowing can be done at either the guilt or penalty phase of trial.

The FDPA channels the jury's discretion during the penalty phase to ensure that the death penalty is not arbitrarily imposed. The federal death penalty regime establishes the class of persons eligible for the death penalty through its definition of capital offenses, to include only treason, espionage, and certain intentional killings. *See* 18 U.S.C. § 3591. Although the federal death penalty regime defines capital offenses, the narrowing function does not occur until the penalty phase of the trial. In narrowing the jury's discretion in federal homicide prosecutions, the FDPA requires the jury first to find that the defendant had the requisite intent. 18 U.S.C. § 3591. The FDPA further narrows the jury's discretion with the requirement the jury find at least one statutory

aggravating factor prior to recommending the death penalty. *See* 18 U.S.C. § 3592(c). Thus, the FDPA narrows the jury's discretion through the findings of intent and aggravating factors. Repetition of the elements of the crime as an aggravating factor helps to channel the jury's discretion by allowing the jury to consider the circumstances of the crime when deciding the propriety of the death sentence. The jury may constitutionally consider the circumstances of the crime when deciding whether to impose the death penalty. *See Tuilaepa v. California*, 512 U.S. 967, 976 (1994).

The narrowing function was not performed at the guilt phase when the jury convicted Jones of kidnapping with death resulting, but at the penalty phase when the jury found Jones intentionally killed McBride and two statutory aggravating factors existed. Although the jury had already found the defendant guilty of kidnapping with death resulting at the guilt phase of the trial, the jury did not consider whether Jones caused the death of the victim during the commission of the crime of kidnapping until the penalty phase of the trial. The jury could have convicted Jones of kidnapping with death resulting in the guilt phase of the trial and still answered "no" to statutory aggravating factor 2(A) in the penalty phase if the jury found that Jones did not cause the death of the victim during the commission of the crime of kidnapping. The submission of the elements of the crime as an aggravating factor merely allowed the jury to consider the circumstances of the crime when deciding whether to impose the death penalty. Thus, the kidnapping was weighed only once by the jury during the penalty phase of the trial. Consequently, the repetition of the elements

of the crime as an aggravating factor did not contradict the constitutional requirement that aggravating factors genuinely narrow the jury's discretion.

B.

Jones contends that the district court committed reversible error by allowing statutory aggravating factor 2(C). Statutory factor 2(C), based on § 3592(c)(6), provides: "The defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." Jones argues that the language used in aggravating factor 2(C) was unconstitutionally vague, resulting in the arbitrary imposition of the death penalty in violation of the Eighth Amendment. As the Supreme Court stated in *Maynard v. Cartwright*:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*.

Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988) (citation omitted). Due to the difficulty in precisely defining aggravating factors, however, "our vagueness review is quite deferential." *United States v. Flores*, 63 F.3d 1342, 1373 (5th Cir. 1995) (quoting *Tuilaepa v. California*, 512 U.S. 967, 975 (1994)). Consequently, an aggravating factor will be upheld as long as it has some "common-sense core

meaning . . . that criminal juries should be capable of understanding." *Id.*

The language "especially heinous, cruel, and depraved" without a limiting instruction would be unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. at 364; *King v. Puckett*, 1 F.3d 280, 284 (5th Cir. 1993). Any vagueness in the language, however, is cured by the limitation in the statute that the offense involve torture or serious physical abuse. *See Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (citing *Maynard v. Cartwright*, 486 U.S. at 364-65). Moreover, the district court defined each term in aggravating factor 2(C) which resolved any possible vagueness or ambiguity of the language.[12] The statutory

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[12] The district court gave the following limiting instruction to explain statutory aggravating factor 2(C):

> To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture *or* serious physical abuse to the victim. The terms "heinous, cruel, or depraved" are stated in the disjunctive: any one of them individually may constitute an aggravating circumstance warranting imposition of the death penalty.
>
> "Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as set apart from other killings.
>
> "Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.
>
> "Depraved" means that the defendant relished the killing or showed indifference to the suffering of

limitation, along with the district court's instruction, gave the jury an aggravating factor with a "common-sense core meaning" that they were capable of understanding. Thus, the language of statutory aggravating factor 2(C) was not

---

the victim, as evidenced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted; and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse – unlike torture – may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse apart from the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; needless mutilation of the victim's body; senselessness of the killing; and helplessness of the victim.

The word "especially" should be given its ordinary, everyday meaning of being highly or unusually great, distinctive, peculiar, particular, or significant.

unconstitutionally vague and did not lead to the arbitrary imposition of the death penalty in violation of the Eighth Amendment.

V. Non-statutory Aggravating Factors

Jones argues that the death sentence must be reversed because the nonstatutory aggravating factors considered by the jury were unconstitutionally vague, overbroad, and duplicative. After giving the appropriate notice required by § 3593(a), the government submitted the following nonstatutory aggravating factors:

> 3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant Louis Jones.
>
> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
>
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

The jury unanimously found nonstatutory aggravating factor 3(B) and 3(C) to exist beyond a reasonable doubt.

The government contends that factors 3(B) and 3(C) apply to entirely different areas of aggravation – 3(B) applies to McBride's vulnerability, while 3(C) applies to "victim impact" or the impact of the murder on McBride's family. Although the use of vulnerability and victim impact evidence has been upheld on appeal, the language used in 3(B) and 3(C) does not accomplish this

goal. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (victim impact); *Tuilaepa*, 512 U.S. at 977 (vulnerability through age of victim). The plain meaning of the term "personal characteristics," used in 3(C), necessarily includes "young age, slight stature, background, and unfamiliarity," which the jury was asked to consider in 3(B). Thus, nonstatutory aggravating factors 3(B) and 3(C) are duplicative. As the Tenth Circuit recently stated, "Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996). We agree. Such double-counting of aggravating factors creates the risk of an arbitrary death sentence. If the jury has been asked to weigh the same aggravating factor twice, the appellate court cannot assume that "it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992). Consequently, the district court erred by submitting the duplicative aggravating factors to the jury.

Additionally, the defendant contends that the non-statutory aggravating factors are vague and overbroad, in violation of the Eighth Amendment. *See Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). We agree. Non-statutory aggravating factors 3(B) and 3(C) fail to guide the jury's discretion, or distinguish this murder from any other murder. We fail to see how the victim's "background," her "personal characteristics," or her "unfamiliarity with San Angelo" made the defendant more deathworthy than other murderers. Furthermore, the district

court offered no additional instructions to clarify the meaning of the non-statutory aggravating factors. The use of the terms "background," "personal characteristics," and "unfamiliarity" without further definition or instruction left the jury with "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *See Maynard*, 486 U.S. at 361-62 (1988). Consequently, aggravating factors 3(B) and 3(C) were invalid.

After determining that the non-statutory aggravating factors submitted to the jury were invalid, we must next determine whether the death sentence may stand. The Federal Death Penalty Act sets up a weighing scheme in which the jury is asked to weigh any aggravating factors found to exist beyond a reasonable doubt against any mitigating factors found to exist by a preponderance of the evidence. If the aggravating factors outweigh the mitigating evidence, then the jury may recommend the death penalty. In a weighing scheme, aggravating factors lie at the very heart of the jury's ultimate decision to impose a death sentence.[13] *See Stringer*, 503 U.S. at 230. Under a weighing statute, affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing

---

[13] In non-weighing statutes, the jury must find the existence of one aggravating factor before imposing the death penalty, but such factors play no additional role in the jury's determination of whether a defendant eligible for the death penalty should receive it under the circumstances of the case. *See Stringer v. Black*, 503 U.S. 222, 229-30 (1992) (discussing the Georgia non-weighing death penalty statute at issue in *Zant v. Stephens*, 462 U.S. 862 (1983)).

process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. *See Stringer*, 503 U.S. at 230. A rule automatically affirming a death sentence in a weighing scheme as long as one aggravating factor remained would violate the requirement of individualized sentencing. *See Clemons v. Mississippi*, 494 U.S. 738, 752 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). When the jury considers an invalid aggravating factor at the sentencing hearing, the appellate court must strike the invalid factor and then either reweigh the remaining aggravating factors against the mitigating evidence or apply harmless error review. *See Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Wiley v. Puckett*, 969 F.2d 86, 92 (5th Cir. 1992).

If the appellate court chooses to reweigh the remaining aggravating factors against the mitigating evidence, the court must determine what the jury would have done absent the invalid aggravating factor. *See Stringer*, 503 U.S. at 230. On the other hand, if the appellate court chooses to apply harmless error review, then the harmless error analysis can be applied in the following two ways: First, the appellate court may inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor been properly defined in the jury instructions. *See Clemons*, 494 U.S. at 754; *Wiley*, 969 F.2d at 92-93. Second, the appellate court may inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor. *See Clemons*, 494 U.S. at 753; *Wiley*, 969 F.2d at 91. If the

government establishes that an error regarding aggravating factors is harmless beyond a reasonable doubt, then the appellate court may not reverse or vacate the death sentence, unless of course such error rises to the level of a denial of constitutional rights. *See* 18 U.S.C. § 3595.

At this point, the appellate court may either reweigh the aggravating and mitigating evidence or apply one of the methods of harmless error review. *See Wiley*, 969 F.2d at 92. It matters not which standard of review an appellate court chooses to apply because all three standards lead to the same conclusion. If a death sentence would be overturned under harmless error review, then the death sentence would be overturned after reweighing, and vice versa. The government asserts that we must apply the harmless error standard. Although the statute provides that an appellate court "shall not reverse or vacate a sentence of death on account of any error which can be harmless," 18 U.S.C. § 3595(c), the statute does not establish a standard of review. Therefore, an appellate court can choose to apply any of the available forms of review as long as the defendant receives an individual determination of the propriety of his death sentence.

In affirming the defendant's death sentence, we apply the second method of harmless error review. In applying the second method of harmless error review, an appellate court must inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors. *See Clemons*, 494 U.S. at 753; *Wiley*, 969 F.2d at 91. This second form of harmless error review requires the appellate court to redact the invalid aggravating factors and "reconsider the entire mix of aggravating and mitigating

circumstances presented to the jury." *See Wiley*, 969 F.2d at 93.

After removing the offensive non-statutory aggravating factors from the balance, we are left with two statutory aggravating factors and eleven mitigating factors to consider when deciding whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factors never been submitted to the jury. At the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury – Jones caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim. Under part two of the Special Findings Form, if the jury had failed to find that the government proved at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore, the ability of the jury to recommend the death penalty hinged on a finding of a least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty. After removing the two nonstatutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors. Consequently, the error was harmless because the death sentence would have been imposed beyond a reasonable

doubt had the invalid aggravating factors never been submitted to the jury.

VI. Conclusion

After considering the eighteen issues raised by the appellant on appeal, we conclude that the sentencing provisions of the Federal Death Penalty Act are constitutional and that the defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Consequently, the conviction and the sentence of death is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 96-10113 & 96-10448

D.C. Docket No. 5:95-CR-47-C-01

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

LOUIS JONES

Defendant – Appellant

Appeals from the United States District Court for the Northern District of Texas, Lubbock.

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.

JUDGMENT
(Filed Jan. 5, 1998)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the sentence and conviction of the District Court in this cause are affirmed.

ISSUED AS MANDATE: **MAR 12 1998**

OP-OA-J-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10113
96-10448

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

LOUIS JONES

Defendant – Appellant

Appeals from the United States District Court for the Northern District of Texas, Lubbock.

PETITION FOR REHEARING

(Filed Mar. 4, 1998)

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cases is denied.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

REHG-2

Supreme Court of the United States

No. 97-9361

Louis Jones,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe that [sic] life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

October 5, 1998

No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would result in a court-imposed sentence less severe than life imprisonment.

2. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation would result in a court-imposed sentence of life imprisonment without possibility of release.

3. Whether the court of appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt.

LIST OF PARTIES

1. United States of America
2. Louis Jones, Jr.

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OPINION BELOW

The opinion of the Court of Appeals (J.A. 82-123) is reported at 132 F.3d 232.

JURISDICTION

The judgment and opinion of the Court of Appeals were issued on January 5, 1998. (J.A. 82-123, 124). Petitioner's timely petition for rehearing was denied on March 4, 1998. (J.A. 125). The petition for a writ of certiorari was filed on June 2, 1998 and was granted on October 5, 1998. (J.A. 126). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. § 1201(a), the federal kidnapping statute under which petitioner was prosecuted, is set out in Appendix A to this Brief. The Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591-98, is set out in Appendix B to this Brief.

STATEMENT

A. Statutory Background

This case was the first tried under the Federal Death Penalty Act of 1994 ("FDPA"), which sets forth procedures to be followed where the government seeks the death penalty for an offense which is potentially punishable by death. First, "a reasonable time before the trial,"

the government must file a written notice of its intent to seek the death penalty, in which it "set[s] forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." 18 U.S.C. § 3593(a).

For homicide cases, these aggravating factors are drawn from a list of sixteen statutory aggravating factors set forth in 18 U.S.C. § 3592(c). In addition to these sixteen factors, however, the government is empowered to charge and submit nonstatutory aggravating factors, under the last sentence of 18 U.S.C. § 3592(c), which provides that "[t]he jury . . . may consider whether any other aggravating factor for which notice has been given exists."

At a sentencing hearing held before the jury that determined the defendant's guilt, *see* 18 U.S.C. § 3593(b), the government presents information in support of the aggravating factors which it has charged, and the defendant presents information in support of any mitigating factors.[1] Aggravating factors must be proved beyond a reasonable doubt; mitigating factors must be proved only by a preponderance of the evidence. *See* 18 U.S.C. § 3593(c).

After the presentation of evidence, the jury is first required to determine beyond a reasonable doubt whether the defendant possessed one of the requisite threshold mental states described in 18 U.S.C. § 3591(a)(2)(A)-(D).[2] In the case of a positive finding, the

[1] These mitigating factors may be those specifically enumerated in 18 U.S.C. § 3592(a)(1)-(7), or they may be "other factors in the defendant's background, record or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(8).

[2] These threshold mental states are designed to ensure that a defendant is not sentenced to death in violation of the

jury next determines which of the noticed aggravating factors and which mitigating factors have been proved. "A finding with respect to any aggravating factor must be unanimous"; however, "a finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established." 18 U.S.C. § 3593(d).

If the jury unanimously finds that one of the noticed statutory aggravating factors has been proved beyond a reasonable doubt,

> the jury . . . shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

18 U.S.C. § 3593(e). The FDPA is thus what the Court has termed a "weighing" statute. *Cf. Stringer v. Black*, 503 U.S. 222, 229 (1992).

"Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum

teachings of the Court in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987).

term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release." 18 U.S.C. § 3594.

Finally, the FDPA provides for detailed appellate review of death sentences returned thereunder. *See* 18 U.S.C. § 3595.

B. Facts Leading to Indictment

On February 18, 1995, petitioner's ex-wife, Sandra ("Sandy") Lane made a final break with petitioner, informing him that there was no chance that they could ever have a future together. After many hours of replaying a tape recording of this conversation and drinking a large quantity of alcohol, petitioner went in search of Lane at Goodfellow Air Force Base, in San Angelo, Texas, where he believed she might be on duty. Unfortunately, he found Tracie McBride, a 19 year old white female private, who bore a strong physical resemblance to Lane.

Petitioner kidnapped McBride and took her to his residence in San Angelo.[3] In the early morning hours of February 19, 1995, he drove McBride to a remote location, where he struck her over the head several times with a tire iron, killing her.

Two weeks later, after being taken into custody on an alleged prior assault of his ex-wife, petitioner admitted that he was the black male who was seen abducting McBride and that he had killed her. Petitioner then voluntarily led law enforcement authorities to the location of McBride's body. An autopsy revealed injuries consistent with sexual assault and concluded that the cause of McBride's death was blunt force trauma to the head.

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[3] While in the process of abducting McBride, petitioner also assaulted one Private Michael Peacock, who was attempting to foil the abduction.

C. Trial, Sentencing, and Appeal

On March 7, 1995, petitioner was indicted for kidnapping resulting in the death of Tracie McBride, 18 U.S.C. §§ 7(3) and 1201(a)(2) (a potentially capital offense); and assault of Michael Alan Peacock, resulting in serious bodily injury. 18 U.S.C. §§ 7(3) and 113(f). (J.A. 5-6). Before trial, the government gave notice of its intention to seek the death penalty. (J.A 7-12). In that notice, the government alleged four statutory aggravating factors[4] and three nonstatutory aggravating factors[5] in support of its request for the death penalty.

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[4] These factors were submitted to the jury as follows:

2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.

2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.

2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.

2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride. (J.A. 51-52).

[5] These factors were submitted to the jury as follows:

3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.

3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense. (J.A. 53).

At the sentencing hearing which followed petitioner's conviction on the two charged offenses, the government first presented its case on aggravation, which included (in addition to the evidence of the offense presented during the guilt/innocence phase): a workplace assault allegedly committed by petitioner in 1970; petitioner's alleged physical and sexual assaults of his ex-wife Sandy Lane; the medical examiner's testimony about the force of the trauma to Tracie McBride's skull; and testimony about Tracie McBride by her mother, Irene McBride.

In mitigation, the defense showed that petitioner had overcome a childhood background of severe physical and sexual abuse and neglect to become a successful noncommissioned officer in the United States Army. During his 22 year Army career, petitioner served with distinction in the Airborne Rangers in both the Grenada invasion and the Gulf War. Petitioner rose through the ranks and was decorated several times.

Petitioner retired from the Army in 1993 in order to be together with his then-wife Sandy Lane, an Army drill instructor. The evidence presented at sentencing showed that this termination of his successful military career proved disastrous. Petitioner made a series of failed attempts to go back to college, and found himself working in minimum wage jobs which were inadequate to support his family. This sudden decline in petitioner's fortunes took its toll on his marriage, and eventually destroyed it altogether.

The defense presented expert psychiatric and psychological testimony to show that petitioner's ability to control his impulses and to act rationally had, on the date of the offense, been severely compromised.[6] The final

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[6] Testimony showed that petitioner suffered from impairment of the frontal lobe of the brain, the part of the brain attributed with rational decisionmaking and impulse control.

break with his ex-wife on February 18, 1995 became the trigger which – coupled with petitioner's childhood sexual and physical abuse, posttraumatic stress disorder from witnessing killings during combat in Grenada and from stressful combat conditions during the Gulf War with numerous physical manifestations, numerous severe head injuries, and the loss of the organizing structure of the Army – led to petitioner's violent actions. In rebuttal, the government presented several expert witnesses who disputed petitioner's claims of brain dysfunction and psychiatric problems.

Before the case was submitted to the jury, the defense realized that the instructions which the District Court proposed to give conveyed the erroneous and highly prejudicial impression that jury deadlock as to the penalty would result in a court-imposed sentence of **less than** life imprisonment. In relevant part, these instructions were as follows:

> In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or nonstatutory – against any mitigating factors that any of you find to exist. * * * **Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.**
>
> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. * * *

If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. **In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**

* * *

In order to bring back a verdict recommending the punishment of death or life without possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

* * *

As you retire to begin your deliberations, you will be provided with a form entitled "Special Findings" on which you should record your determinations as to the existence or non-existence of any aggravating factor. You will also be provided with four forms entitled "Decision Form A, B, C, and D" on which you will record your decision regarding your sentencing recommendation. The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the

required intent on the part of the defendant or a required aggravating factor. **Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because:** (1) you do not **unanimously** find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not **unanimously** find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not **unanimous** in recommending that a sentence of death should be imposed. **Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed.** (J.A. 43-45, 47-48) (emphasis added).

Petitioner sought to correct the potential misunderstanding he had identified by requesting an instruction that, if the jury could not unanimously agree whether petitioner should be sentenced to death or life imprisonment, but did agree that he should receive one or the other, he would be sentenced to a term of life imprisonment without the possibility of parole or release. Particularly, in his Requested Jury Instruction No. 5, petitioner requested that the jury be instructed as follows:

> In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded

beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. **In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.** In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

> **In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.** (J.A. 14-15) (emphasis added).

However, the District Court refused to give this instruction. (J.A. 30, 33).

After a day and a half of deliberations, the jury returned its sentencing verdict along with its special findings as to the aggravating and mitigating factors. (J.A. 50-59). The jury did not find two of the statutory aggravating factors submitted: 2(B) (that petitioner caused a grave risk of death to another person) and 2(D) (that petitioner committed the killing after substantial planning and premeditation). The jury did find the other two statutory aggravating factors – 2(A) (that petitioner

caused the death of McBride, or injury resulting in her death, in the commission of the kidnapping) and 2(C) (that petitioner committed the offense in a heinous, cruel, and depraved manner) – had been proved beyond a reasonable doubt.

The jury did not find nonstatutory aggravating factor 3(A) (that petitioner constituted a future danger to the lives and safety of other persons). The jury did find the other two nonstatutory aggravating factors, 3(B) (Tracie McBride's young age, slight stature, background, and unfamiliarity with San Angelo, Texas), and 3(C) (Tracie McBride's personal characteristics and the effect of the instant offense on her family).

The jury found all ten of the specific mitigating factors submitted by petitioner.[7] Additionally, seven jurors

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[7] These mitigating factors, along with the number of jurors finding these factors (in parentheses), were as follows:

1. That petitioner did not have a significant prior criminal record (6);

2. That petitioner's capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law was significantly impaired (2);

3. That petitioner committed the offense under severe mental or emotional disturbance (1);

4. That petitioner was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) (4);

5. That petitioner served his country well in Desert Storm, Grenada, and for 22 years in the United States Army (8);

6. That petitioner is likely to be a well-behaved inmate (3);

7. That petitioner is remorseful for the crime he committed (4);

8. That petitioner's daughter will be harmed by the emotional trauma of her father's execution (9);

"wrote in" "Sandy Lane" – petitioner's ex-wife – as a mitigating circumstance. (J.A. 56). Nevertheless, the jury returned a verdict of death. (J.A. 57-58).

Petitioner filed a timely motion for new trial specifically urging that the jury's "critical misunderstanding" of the consequences of nonunanimity in the sentencing verdict directly resulted in the verdict of death. (J.A. 60-68). Petitioner argued that "the fear that the court could impose a sentence of less than life without possibility of release if there was not a unanimous verdict was improperly used as leverage in overcoming the scruples of those jurors who reasonably felt that the appropriate punishment was life without release." (J.A. 62). Petitioner noted that his Requested Instruction No. 5 would have cured this error. (J.A. 62).

Petitioner attached an affidavit detailing a post-verdict interview conducted with juror Christie Beauregard, who had contacted the defense on her own initiative.[8] (J.A. 66-68). Ms. Beauregard stated that "[d]uring deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence." (J.A. 66). "She stated that there was considerable pressure in deliberations to prevent that

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9. That petitioner was under unusual and substantially internally generated duress and stress at the time of the offense (3); and

10. That petitioner suffered from numerous neurological or psychological disorders at the time of the offense (1). (J.A. 54-56).

[8] In fact, the attorneys were forbidden, by local rule, from initiating any contact with the jurors. Ms. Beauregard spoke with defense attorney Carlton McLarty and defense investigator Daniel Salazar, and thereafter Mr. Salazar executed an affidavit detailing what Ms. Beauregard had said.

outcome." (J.A. 67). "She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release." (J.A. 67). Finally, "[s]he sa[id] that if the jury had known that if they were unable to reach a verdict between life without possibility of release and death that the Judge would have imposed a life without possibility of release sentence then she would not have agreed to vote for a death sentence. She believed other jurors shared that view." (J.A. 68). The District Court, however, denied petitioner's motion for new trial. (J.A. 74).

Petitioner filed a motion asking the District Court to reconsider its denial of his motion for new trial. (J.A. 75-80). Petitioner again urged that "[t]he jury thus sentenced the defendant to death based on the erroneous belief that failure to agree on a verdict could result in the imposition of a 'lesser sentence' that would result in the defendant's release from prison." (J.A. 76). Petitioner argued that he was "harmed by unwarranted speculation regarding his possible release." (J.A. 76).

Petitioner attached the affidavit of juror Cassandra Hastings, who had also initiated contact with defense counsel. (J.A. 78-80). Ms. Hastings's account of juror confusion dovetailed with that of Ms. Beauregard. Ms. Hastings stated that "[i]nitially, no one knew exactly what would happen if we were unable to reach a verdict." (J.A. 78). She stated that when "[i]t looked like we might have a hung jury[, a]t this point we again discussed the effect of a hung jury." (J.A. 79).

Ms. Hastings then stated that "[o]ne of the men [jurors] . . . said that if we had a hung jury then the sentence would be left up to the judge and that Louis Jones would get the lesser sentence referred to in the last jury verdict form. People then brought up the possibility that Mr. Jones could be released from prison. No one

wanted this to happen or even be possible." (J.A. 79). Like Ms. Beauregard, Ms. Hastings stated that she would not have changed her vote from life without release to death had she known that a hung jury would not result in a "lesser sentence" leading to petitioner's ultimate release from prison. (J.A. 79).

The District Court, however, denied petitioner's motion to reconsider. (J.A. 81).

Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. That court affirmed the judgment of conviction and sentence of death (J.A. 82-123, 124), and denied petitioner's timely petition for rehearing. (J.A. 125).

SUMMARY OF ARGUMENT

I. Under 18 U.S.C. § 1201(a), petitioner faced a sentence of either "death or life imprisonment" for the kidnapping of Tracie McBride. Under federal law, a sentence of life imprisonment carries no possibility of parole or release. Unfortunately, there was **at least** a "reasonable likelihood" that the jury erroneously believed that failure to agree on a penalty recommendation of death or life imprisonment without release would result in the imposition of "some other lesser sentence" by the court.

First, the instructions gave the impression that, if the jury failed to unanimously agree on a sentence of death or life without release, it would then become the court's responsibility to assess sentence; and that court-imposed sentence would be a "lesser sentence." Second, and even worse, the instructions and the verdict forms suggested that, if the jury failed to agree on a sentence of death or life without release, it should so indicate by selecting Decision Form D, the verdict form for the "lesser sentence" option.

In fact, there was more than a reasonable likelihood of misinterpretation. As detailed in two affidavits filed of

record, two jurors have stated that the jury **actually** misinterpreted the instructions in the fashion just described. Even without those affidavits, however, it is clear that it is at least reasonably likely that the jurors erroneously interpreted the jury instructions and verdict forms in the fashion discussed here.

The possibility that the jury returned a recommendation of death under an erroneous interpretation of the jury instructions constitutes an "arbitrary factor" requiring reversal under 18 U.S.C. § 3595 of the FDPA. Reversal is likewise required either under the error correction prong of § 3595 or, alternatively, in the Court's capacity as supervisor of the lower federal courts, especially since, in federal death cases, "doubts such as those presented here should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). Finally, petitioner's sentence also violates the Eighth Amendment's prohibition of death sentences returned on the basis of inaccurate information, as well as the Fifth Amendment's corresponding due process prohibition of sentences based on materially false information.

II. The District Court erred in denying petitioner a jury instruction that the result of jury deadlock on the sentencing recommendation would be a court-imposed sentence of life without release. The plain language of 18 U.S.C. § 3594 requires that, unless the jury unanimously recommends a sentence of death or life imprisonment without the possibility of release, the duty of sentencing devolves upon the court. The legislative history of the FDPA confirms this interpretation. The only option for such court-sentencing in this case would have been the alternative sentence of life imprisonment without the possibility of parole or release.

The requirement that death sentences not be imposed under the influence of any "arbitrary factor" requires that juries be affirmatively and correctly instructed as to all the sentencing options, including the consequences of

jury deadlock, so that the jury will not impose the death penalty based on its speculation about what will happen in the event of a deadlock. Moreover, failure to give the requested instruction exacerbated the error created by the misleading instructions, and requires correction under the "arbitrary factor" review of the FDPA, the error correction prong of the FDPA, or simply in the exercise of the Court's role as overseer of the lower federal courts.

Finally, the Eighth Amendment's proscription of arbitrary and capricious death sentences requires that capital sentencing juries be informed as to the consequences of nonunanimity. Moreover, the failure to give the instruction in the instant case exacerbated the problem of the erroneous jury instructions actually given, and resulted in a death sentence imposed on the basis of inaccurate information in violation of both the Eighth Amendment and the Fifth Amendment Due Process Clause.

III. The Court of Appeals held that the trial court submitted two invalid aggravating factors to the jury at the sentencing phase of the trial, but nonetheless affirmed the death sentence on the grounds of harmless error. The FDPA allows such a conclusion only where the government proves the error was harmless beyond a reasonable doubt. The purported "harmless error" analysis of the Court of Appeals, however, is simply a bare assertion lacking any analysis or explanation indicating how it reached that conclusion. The court made no explanation based upon the record as to why it was convinced beyond a reasonable doubt that the jury would have reached the same sentence absent the invalid aggravating factors. Most significantly, the Court of Appeals' opinion is completely silent with respect to the particulars of the mitigating evidence offered by petitioner and the eleven mitigating factors found by the jurors. Because the court's cryptic conclusion did not provide petitioner with an individualized determination of his sentence, the judgment of the Court of Appeals must be reversed.

ARGUMENT

I. THERE WAS AT LEAST A REASONABLE LIKELIHOOD THAT THE JURY INSTRUCTIONS AND VERDICT FORMS LED THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT.[9]

A. Introduction

Once the jury returned its verdict of guilty on the kidnapping charge against petitioner, there were only two possible sentencing outcomes: death, or life imprisonment without release or parole. The statute under which petitioner was convicted provides that one who commits a kidnapping "shall be punished by imprisonment for any term of years or for life and, if **death results, shall be punished by death or life imprisonment.**" 18 U.S.C. § 1201(a) (emphasis added).

In the trial as to guilt/innocence, the jurors were instructed that, in order to convict petitioner of the crime charged, they had to find, beyond a reasonable doubt, "[t]hat the death of Tracie Joy McBride resulted [from the kidnapping]." (Ct. App. Rec. Vol. 6, p. 1060). Thus, the jury's verdict of guilty represented a finding, beyond a reasonable doubt, of "death result[ing]," thereby limiting the possible punishments to either death or life imprisonment. Moreover, because parole has been abolished in the federal system,[10] and because a person subject to a life

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[9] This argument addresses the second question as to which the Court granted certiorari in this case. A decision for petitioner on the second question presented would obviate the need for the Court to decide the first question presented, and the potentially far-reaching sub-issues it raises. Therefore, petitioner has chosen to address Question 2 before Question 1.

[10] *See* Pub. L. 98-473, tit. II, ch. II, § 218(a)(5) (1984).

sentence is not eligible to receive "good time,"[11] "life imprisonment" means that the person will never be released. Therefore, as the jury went into the sentencing hearing, there were only two options: death, or life imprisonment which was, perforce, without the possibility of parole or release.

Unfortunately, the jury instructions and verdict forms (J.A. 34-49, 50-59) gave the jurors the erroneous impression that, if they could not unanimously agree on a sentencing recommendation of death or life without the possibility of release, the duty of sentencing would devolve upon the court, which would then impose some unspecified "lesser sentence."

B. The Court of Appeals Erred in Holding that There Was No Reasonable Likelihood that the Jury Instructions and Verdict Forms Submitted to the Jury Misled the Jury.[12]

It is very important to be clear on exactly what is at issue here, and what is not. The issue is **not** whether it

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[11] *See* 18 U.S.C. § 3624(b)(1).

[12] Where a state criminal defendant makes a claim that an instruction is ambiguous and subject to an erroneous interpretation which violates some federal constitutional right, the Court "inquire[s] 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (footnote omitted), *quoting Boyde v. California*, 494 U.S. 370, 380 (1990). However, because this is a federal case, with the Court sitting in review of the decision of a court of appeals on direct review, the Court's review of the instructions includes also review for nonconstitutional error cognizable in the Court's role as supervisor of the lower federal courts. The standard for reversal of nonconstitutional instructional errors in a federal case – especially a federal capital case – is at least arguably not so stringent as the "reasonable likelihood" standard of *Boyde* and *Estelle v. McGuire*. *See, e.g., Andres v. United States*, 333 U.S. 740, 752 (1948) (finding reversible instructional error in federal capital case where "the jury might reasonably conclude" that erroneous interpretation of instructions was the proper one, and noting that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused"). Nevertheless, the Court need not resolve the standard of review issue here, because even the "reasonable likelihood" standard is easily satisfied under the circumstances of this case.

was error to inform the jury that there was a "lesser sentence" option that in fact did not exist.[13] Rather, the issue is whether the jury instructions and verdict forms could have led a reasonable jury to believe that the court would impose a sentence less than life imprisonment if the jury failed to reach a unanimous verdict.[14]

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[13] With respect to this point, the Court of Appeals, finding that "[t]he defendant did not object to the inclusion of the 'lesser sentence' option below," reviewed only for plain error. (J.A. 107). The Court of Appeals agreed with petitioner that, because petitioner could not possibly receive any sentence less than life imprisonment without possibility of parole or release, it was error to submit the "lesser sentence" option to the jury for its consideration. (J.A. 110). However, the Court of Appeals held that the error was not "plain," because "[p]rior to this appeal, the death penalty sentencing provisions under which Jones was sentenced had never been reviewed on appeal," and thus "[n]o clearly established law answered the question" whether the "lesser sentence" option was unavailable where the substantive statute provided only for death or life imprisonment. (J.A. 110-111).

[14] This issue was properly preserved for review by petitioner's rejected request for a jury instruction on the consequences of jury nonunanimity. Even if that were not true, however, the issue was also preserved by being raised in both a timely motion for new trial (J.A. 60-68) and a motion to reconsider (J.A. 75-80). The Court of Appeals did not consider the issue forfeited, but rather reviewed it on the merits. Under these circumstances, the issue is properly before the Court. *See Leary v. United States*, 395 U.S. 6, 32 (1969) (even where

Analyzing the instructions given to the jury, the Court of Appeals concluded that "the instructions could not have led a reasonable jury to conclude that non-unanimity would result in the imposition of a lesser sentence." (J.A. 102). The Court of Appeals conceded that "the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option"; but then held that "any confusion created by the verdict forms was clarified in light of the entire jury instruction."[15] (J.A. 102-103). The Court of Appeals also refused to consider the juror affidavits. (J.A. 104-106).

Contrary to the holding of the Court of Appeals, there was **at least** a "reasonable likelihood" that the instructions and the verdict forms gave the jury the extremely prejudicial impression that a lack of unanimity as to either death or life without release would result in the court's imposition of a "lesser sentence." This occurred in two separate, though related, ways. First, the instructions gave the impression that, if the jury failed to unanimously agree on a sentence of death or life without release, it would then become the court's responsibility to assess sentence; and that court-imposed sentence would be a "lesser sentence." Second, and even worse, the instructions and the verdict forms suggested that, if the

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petitioner did not object to jury instructions on the basis of an allegedly unconstitutional presumption, issue was properly before the Court where raised in a motion for a directed verdict and in a motion for new trial, and where court of appeals considered issue on the merits). Finally, as discussed at footnote 22, *infra*, the FDPA's mandated appellate review for "passion, prejudice, or any other arbitrary factor" would require review of petitioner's claim even if there had been no objection at all.

[15] Because the Court of Appeals found that petitioner did not object to the format of the verdict forms, it reviewed these only for plain error. (J.A. 102).

jury failed to agree on a sentence of death or life without release, it should so indicate by selecting Decision Form D, the verdict form for the "lesser sentence" option.

Immediately after twice referring to the jury's ability to recommend a "lesser sentence" (J.A. 43, 44), the District Court told the jury, "[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. **That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**" (Emphasis added.) (J.A. 44). The latter sentence told the jury in no uncertain terms that the jury's failure to agree on a sentence of death or life without the possibility of release would result in the court's imposing sentence. Especially following the previously mentioned "lesser sentence" option, a natural inference is that the court's sentence would be such a "lesser sentence."

This inference was strengthened when the District Court told the jury, "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." (J.A. 45). The conspicuous absence of the "lesser sentence" option from this statement strongly implied that, in contradistinction to the first two options, the "lesser sentence" option did **not** require jury unanimity and hence would be the result of nonunanimity.[16]

The same impression was given later in the instructions when the jury was told that "Decision Form B

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[16] *Expressio unius est exclusio alterius. See, e.g., Leatherman v. Tarrant County Narcotic Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *TVA v. Hill*, 437 U.S. 153, 188 (1978).

should be used if you **unanimously** recommend that a sentence of death be imposed . . . Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed." (Emphasis added.) (J.A. 47). Here again, the requirement of unanimity, explicitly mandated for the death and life without release options, was conspicuously absent from the option of the "lesser sentence" presented on Decision Form D. In light of the omission of the word "unanimously" from the last quoted sentence above, there was at least a reasonable likelihood that the jurors interpreted these instructions to mean that the "lesser sentence" option, unlike death or life imprisonment without release, did not require unanimity – and that, therefore, the "lesser sentence" option would be the result of a lack of unanimity.[17]

Such a conclusion is bolstered by the verdict forms. Decision Form B stated, "[W]e recommend, **by unanimous vote**, that a sentence of death be imposed," and required each of the twelve jurors to individually sign his or her name thereto. (Emphasis added.) (J.A. 57-58). Decision Form C stated, "We the jury recommend, **by unanimous verdict**, a sentence of life imprisonment without the possibility of release," and again required each of the jurors to sign the form individually. (Emphasis added.) (J.A. 58). In contrast, Decision Form D stated "We the jury recommend some other lesser sentence," with no mention

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[17] Indeed, the Court has recognized the reasonableness of such an interpretation in its canon of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation and internal quotation marks omitted).

of unanimity, and required only the signature of the jury foreperson. (J.A. 59). Again, the explicit requirement of jury unanimity for death or life without release – coupled with the conspicuous omission of any mention of unanimity in connection with the "some other lesser sentence" – would certainly have led a reasonable jury to conclude that the "some other lesser sentence" would be the result of a lack of jury unanimity.[18]

The jury was presented with three sentencing verdict options, two of which explicitly required unanimity every time they were mentioned (death or life without release), and one of which did not (the "lesser sentence" option). Furthermore, the jury was never told that it had the option of selecting none of these verdict options and leaving the verdict form incomplete. Indeed, the jury was given quite the opposite impression. It was told that it should use Decision Form A if the government failed to prove the requisite intent or a required aggravating factor; Decision Form B if the jury unanimously recommended a sentence of death; and Decision Forms C or D if (1) the jury did not unanimously agree that the aggravators outweighed the mitigators, (2) the jury did not unanimously agree that the aggravators justified a death sentence if no mitigators had been proved, or (3) **"regardless of [its] findings with respect to aggravating and mitigating factors [the jury was] not unanimous in recommending that a sentence of death should be imposed."** (Emphasis added.) (J.A. 47-48).

Thus, the jury was explicitly told that, if it was not unanimous in recommending that a death sentence should be imposed, it must use either Decision Form C or Decision Form D. But, in the very next sentence, the jury

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[18] The Court of Appeals conceded that "the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option. . . ." (J.A. 102-103).

was then told that "Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed." (Emphasis added.) (J.A. 48). This meant that Decision Form C was ruled out for a non-unanimous jury – and, since the jury was told that it must select Decision Form C or D, this left only Decision Form D. And, since neither Decision Form D, nor the instructions pertaining to it, required jury unanimity, the jury could quite reasonably have concluded that a deadlock as to penalty would require them to return the verdict form with Decision Form D signed by the jury foreperson.

The Court has recognized that "juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so." *Mills v. Maryland*, 486 U.S. 367, 383 (1988). It is thus at least reasonably likely that the jury believed that (1) it had to select at least one of the verdict options; and (2) that the only verdict option available in the case of nonunanimity was the "some other lesser sentence" option of Decision Form D, which might result in petitioner's eventual release from prison.

In fact, there was more than a reasonable likelihood of misinterpretation. As detailed in the two affidavits discussed above, two jurors have stated that the jury **actually** misinterpreted the instructions in the fashion just described.[19] Even without those affidavits, however,

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[19] The Court of Appeals erred in refusing to consider these affidavits. The ban on jury impeachment of verdicts contained in Federal Rule of Evidence 606(b) is not applicable since the Federal Rules of Evidence do not, by their own terms, apply to sentencings. *See* FED. R. EVID. 1101(d)(3). Moreover, this Court has recognized that, although the common law generally disfavors the use of juror affidavits or testimony to impeach a verdict, consideration of such affidavits or testimony may nevertheless be necessary "in the gravest and most important cases," *McDonald v. Pless*, 238 U.S. 264, 269 (1915), where refusal to consider them would "violat[e] the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851).

The instant case presents just such a case. In light of the fact that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality op.), and in light of the importance of searching appellate review to the constitutional operation of the death penalty, "the plainest principles of justice" require that the Court consider the affidavits in question here.

it is clear that it is at least reasonably likely that the jurors erroneously interpreted the jury instructions and verdict forms as discussed here.

C. The Reasonable Likelihood that the Jury Erroneously Interpreted the Instructions and Verdict Forms in the Fashion Discussed Here Requires Reversal of Petitioner's Death Sentence.

It is thus at least reasonably likely that the instructions and verdict forms created the erroneous – and highly prejudicial – fear that jury nonunanimity would result in a court-imposed less-than-life sentence.[20] Reversal of this sentence is required, both under well-settled principles of federal nonconstitutional law and under the Constitution.

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[20] It has repeatedly been recognized that the fear that a defendant will receive (or serve) less (or significantly less) than a natural life sentence is a major determinant in the capital sentencing jury's decision whether or not to impose a sentence of death. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality op.); *Brown v. Texas*, ___ U.S. ___, 118 S.Ct. 355, 356 n.2 (1997) (STEVENS, J., respecting the denial of the petition for a writ of certiorari).

1. Nonconstitutional bases for reversal

Under the FDPA, the court of appeals is required to "consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. . . . " 18 U.S.C. § 3595(c)(1). Furthermore, "[w]henever the court of appeals finds that . . . the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death." 18 U.S.C. § 3595(c)(2).

The FDPA's mandated appellate review for "passion, prejudice, or any other arbitrary factor" clearly has its genesis in the identical language in the Georgia death penalty statute approved by the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).[21] By including the *Gregg* statute's mandatory review for "passion, prejudice, or any other arbitrary factor" in the FDPA, Congress followed numerous state jurisdictions. *See, e.g., State v. Sonnier*, 379 So.2d 1336, 1370 (La. 1980) (on rehearing) ("the Louisiana legislature modeled our present statutes after those approved in *Gregg*"). In adopting the *Gregg* review for arbitrary factors, Congress must also be presumed to have adopted these jurisdictions' judicial interpretations of the term "arbitrary factor."[22] *See Carolene Products Co.*

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[21] *See United States v. Frank*, 8 F.Supp.2d 253, 272 (S.D.N.Y. 1998) ("The FDPA's appellate review provisions closely track those approved in *Gregg*.") Appellate review for "passion, prejudice, or any other arbitrary factor" was a key factor in the Court's holding that the Georgia statute at issue in *Gregg* was constitutional. *See Gregg*, 428 U.S. at 204 & 206 (opinion of Stewart, Powell, & STEVENS, JJ.) & 211-12 & 223-24 (White, J., concurring).

[22] Furthermore, Congress must also be presumed to have adopted another feature of *Gregg*-type mandatory appellate review for "passion, prejudice, or any other arbitrary factor," namely: that such review must be conducted **even where there has been no objection by the defendant**. This was the rule under the very Georgia statute at issue in *Gregg*, *see Zant v. Stephens*, 462 U.S. 862, 880 n.19 (1983) ("The Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial.") (citation omitted); *see also Prevatte v. State*, 233 Ga. 929, 931, 214 S.E.2d 365, 367 (1975); and this is the rule in other *Gregg*-type jurisdictions. *See, e.g., State v. Rhines*, 548 N.W.2d 415, 440 n.3 (N.D.), *cert. denied*, 519 U.S. 1013 (1996); *State v. Osborn*, 102 Idaho 405, 410-11, 631 P.2d 187, 192-93 (1981); *Sonnier*, 379 So.2d at 1371 & n.4.

v. United States, 323 U.S. 18, 26 (1944) ("the general rule [is] that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording.") (citations omitted). And it is clear from other *Gregg* jurisdictions that instructional errors may constitute "arbitrary factors" requiring an appellate court to reverse under the "passion, prejudice, or any other arbitrary factor" review. *See, e.g., Parker v. State*, 887 P.2d 290, 299 (Okla. Crim. App. 1994); *State v. Brown*, 414 So.2d 689, 699-701 (La. 1982).

Particularly, several courts have found that jury instructions or prosecutorial arguments which cause a jury to speculate that, if they do not impose a death sentence, the defendant may one day be released, constitute an "arbitrary factor" mandating reversal of the death sentence. *See, e.g., Williams v. State*, 544 So.2d 782, 796-99 (Miss. 1989) (on rehearing); *Williams v. State*, 445 So.2d 798, 813 (Miss. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Brown*, 414 So.2d at 699-701; *State v. Lindsey*, 404 So.2d 466, 485-87 (La. 1981). The concerns underlying these cases are exacerbated when the jury is given inaccurate, incomplete, or misleading information about the possibilities of a defendant's future release. *See, e.g., Jones v.*

State, 101 Nev. 573, 580-82, 707 P.2d 1128, 1133-34 (1985); *Sonnier*, 379 So.2d at 1371-72.

The Court should follow the lead of these jurisdictions (as Congress presumably intended) and find that the reasonable likelihood of juror misinterpretation of the jury instructions constitutes an "arbitrary factor" under the FDPA requiring reversal of petitioner's death sentence. The Louisiana Supreme Court has explained why this should be so:

> When a jury's attention is diverted from its primary responsibility of weighing the circumstances of the crime and the character and propensities of the offender and thrust into speculation about the future actions of as yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation process, thereby rendering the decision arbitrary . . . . In addition, the journey into this speculatory exercise necessarily raises the possibility that the jury will be motivated to act out of fear of the unknown possibility that the defendant might return to society, thereby compounding the risk of arbitrariness.

Lindsey, 404 So.2d at 487. Here, the jury's "error of law concerning the available sentencing options must be construed as an arbitrary factor, which has a negative impact on the validity of the death sentence." *Allen v. State*, 821 P.2d 371, 376 (Okla. Crim. App. 1991). The Court should therefore reverse petitioner's sentence as imposed as the result of an "arbitrary factor" under § 3595(c)(2)(A) of the FDPA.

Reversal should also follow as a matter of the authority for error correction conferred by 18 U.S.C. § 3595(c)(2)(C), or, alternatively, simply as a matter of the Court's role as supervisor of the lower federal courts. In

Bollenbach v. United States, 326 U.S. 607 (1946), the Court, acting in this capacity, reversed a federal conviction obtained on the basis of a defective jury charge. In so doing, the Court noted that "[a] charge should not be misleading," *id.* at 614 (citation omitted), and that "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Id.* at 613.

Indeed, the Court has, on the basis of these very principles, reversed a federal death sentence imposed under instructions that may have misled the jury about the consequences of failing to reach a unanimous sentencing decision. *See Andres v. United States*, 333 U.S. 740 (1948). Under the federal statutes at issue in *Andres*, the jury's verdict of guilt would normally mean that the defendant would be put to death; however, the jury also had the option of "qualifying" their verdict by adding "without capital punishment." The Court first interpreted the statutes at issue to hold that a death sentence would only result if the jury were unanimous in rejecting a "without capital punishment" qualification. *See Andres*, 333 U.S. at 748-49. The Court then turned to the question "whether the instructions given by the trial judge clearly conveyed to the jury a correct understanding of the statute." *Id.* at 749. The Court held that the jurors might reasonably – but erroneously – have thought that failure to achieve unanimity on a "without capital punishment" qualification required the return of an unqualified verdict, resulting in a death sentence. *Id.* at 752. Holding that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused," the Court reversed. *Id.*

Here, as in *Andres*, there is at least a reasonable likelihood that the death sentence was the result of a critical inaccuracy in the jury instructions. Resolving

those doubts in favor of petitioner, as *Andres* requires, the Court should reverse petitioner's death sentence.[23]

2. Constitutional bases for reversal

Because there was at least a reasonable likelihood that petitioner's death sentence was imposed on the basis of inaccurate information, that sentence violates the Eighth Amendment. The Eighth Amendment "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and STEVENS, JJ.). This discretion must "be exercised in an informed manner." *Id.* Thus, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Id.* at 190.

Indeed, the Court has repeatedly stressed that the touchstone of Eighth Amendment claims like this one is whether the information given to the capital sentencing jury is **accurate**. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994) & *id.* at 14-15 (O'CONNOR, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320, 336 (1985) (plurality op.) & *id.* at 341-43 (O'CONNOR, J., concurring in part

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[23] Relatedly, it is well established that a superior court may, in the exercise of its supervisory role, remand to a lower court for resentencing when there is even a possibility that the sentencer misunderstood its sentencing options. *See, e.g., United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (KENNEDY, J.) (vacating sentence and remanding for resentencing where there was a possibility that judge imposed sentence of life without parole based upon mistaken advice from the government that defendant would nevertheless be eligible for parole after serving only ten years of his sentence).

and concurring in the judgment). The Court has not hesitated to find an Eighth Amendment violation where, as here, the jury is given inaccurate information. *See, e.g., Caldwell, id.; cf. Johnson v. Mississippi*, 486 U.S. 578, 585-87 & 590 (1988) (Eighth Amendment violated where capital sentencing jury allowed to consider "materially inaccurate" evidence of prior conviction which was later vacated).

Here, there is no dispute that petitioner could not receive less than life without parole for the crime of which he was convicted. Thus, because it is at least reasonably likely that the jury misinterpreted its instructions and the verdict forms to mean that petitioner would receive some lesser sentence if the jury deadlocked on the penalty recommendation, it is likewise reasonably likely that petitioner was sentenced to death on the basis of inaccurate information in violation of the Eighth Amendment.[24]

The reasonable likelihood that petitioner was sentenced to death on the basis of the jury's erroneous assumptions about the effect of a jury deadlock also violated the Fifth Amendment's guarantee of due process. The Court has long recognized that sentences based on "assumptions . . . which [are] materially untrue" or "on a

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[24] The erroneous jury instructions effectively forced jurors who might have considered a sentence of life imprisonment into an unconstitutional all-or-nothing choice between death and a less-than-life sentence. *Cf. Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (striking on Eighth Amendment grounds an Alabama procedural rule that forbade the giving of a lesser included offense instruction in a capital case, on the ground that forcing the jury into an all-or-nothing choice between conviction for a capital offense and outright acquittal "interject[ed] irrelevant considerations into the factfinding process," thereby "introduc[ing] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case").

foundation [which is] extensively and materially false" violate due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This principle applies with even greater force in the capital sentencing context, where the necessity of accurate sentencing information is reinforced by the Eighth Amendment requirement of "heightened reliability" in the imposition of death sentences. Accordingly, the Court should reverse petitioner's death sentence.

II. PETITIONER WAS ENTITLED TO A JURY INSTRUCTION THAT THE JURY'S FAILURE TO AGREE ON A SENTENCING RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.[25]

The District Court erred in denying petitioner's requested instruction (J.A. 14-15) that the result of jury deadlock on the sentencing recommendation would be a court-imposed sentence of life without release. First, contrary to the holding of the Court of Appeals, such an instruction correctly states the law. Second, the instruction was required, not only as a matter of affirmative right, but also, under the circumstances of this case, to correct the erroneous and highly prejudicial impression which the other instructions gave: namely, that jury deadlock would result in some court-imposed sentence **less** than life imprisonment.

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[25] As previously discussed, if the Court grants petitioner relief on the narrower question previously discussed, the Court need not reach this potentially more far-reaching question. *See* footnote 9, *supra*.

A. Under the FDPA as Applied to this Case, Jury Deadlock Would Have Resulted in a Court-Imposed Sentence of Life Imprisonment Which was Perforce Without the Possibility of Parole or Release.

The Court of Appeals agreed that, as this jury went into the sentencing hearing, there were only two sentencing options available: death, or life imprisonment which was, perforce, without the possibility of parole or release. (J.A. 110). The Court of Appeals nevertheless found no error in the District Court's refusal to give petitioner's requested instruction on the effect of jury nonunanimity, because the Court of Appeals found that the instruction was not a correct statement of the law. Particularly, the Court of Appeals held that, contrary to petitioner's argument, jury deadlock on the penalty recommendation would not result in a court-imposed sentence of life imprisonment because "the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results." (J.A. 103). The Court of Appeals thus apparently accepted the government's argument that a hung jury in the sentencing phase would require a new sentencing hearing.[26]

Contrary to this ruling, a "mistrial" and a new sentencing hearing are not permissible options where the sentencing jury deadlocks as to the appropriate punishment. While the FDPA does admonish that, after weighing the aggravating factors against any mitigating factors, "the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to

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[26] Notably, this argument did not make its debut until the appellate stage. At the trial stage, the government had expressed the view that jury nonunanimity would result in court sentencing. *See* Government's Response to Defendant's Motion for New Trial (J.A. 73).

life imprisonment without possibility of release or some other lesser sentence," 18 U.S.C. § 3593(e), this provision does not, however, speak to the case where the jury cannot arrive at a unanimous sentencing decision.

Rather, the jury deadlock situation is covered by the very next section of the FDPA, which provides that

> Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.** Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. § 3594 (emphasis added).

The meaning of § 3594 could not be any plainer. If the jury unanimously recommends death or life without release, the court is required to impose those sentences. "Otherwise" – *i.e.*, **in any other case** – the duty of sentencing devolves upon the court. The "otherwise" clause thus plainly encompasses not only the scenario of a unanimous recommendation for a lesser sentence, but also the scenario of a jury deadlocked over the penalty recommendation.

"[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Lest there remain any doubt, however, the legislative history of the FDPA confirms that petitioner's interpretation of § 3594 is the correct one. In the Judiciary Committee's Report on House Bill No. 4035, the Committee, in its section-by-section analysis of the identical language at issue here, explained as follows:

> Subsection 3593(e) requires the sentencer to consider whether all the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify a sentence of death. Based upon this consideration, a unanimous jury, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release, or to some lesser sentence. **If the jury is not unanimous, the judge shall impose the sentence pursuant to Section 3594.**

H.R. REP. NO. 103-467, at 9 (1994), *available in* 1994 WL 107578, at 26 (emphasis added). Given that Committee Reports on a bill are the type of legislative history viewed as most "authoritative" by the Court, *see Garcia v. United States*, 469 U.S. 70, 76 (1984), this very clear statement about the effect of jury nonunanimity demonstrates that the Court of Appeals was wrong in holding that a deadlocked jury would require sentencing by a new jury.

In sum, petitioner's requested jury instruction was substantively correct: a failure by the jury to unanimously vote for the death penalty would have resulted in a sentence of life imprisonment without the possibility of parole or release for petitioner.[27]

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[27] To be sure, this will not always be the case under § 3594. Many potential death penalty offenses permit alternative penalties of, not only life imprisonment, but also lesser penalties. *See, e.g.*, 18 U.S.C. § 242; 18 U.S.C. § 844(d).

B. The Failure to Give Such an Instruction Requires Reversal of Petitioner's Death Sentence.

Petitioner was entitled to an instruction on the effect of nonunanimity, both as a matter of affirmative right and also in order to correct the erroneous impression (created by the instructions actually given) that nonunanimity on the sentencing recommendation would result in a court-imposed sentence of less than life imprisonment. Petitioner's entitlement to this instruction rests on both nonconstitutional and constitutional grounds.

1. Nonconstitutional bases for reversal

First, the failure to give the instruction at issue here created an "arbitrary factor," vitiating the death sentence and requiring reversal under 18 U.S.C. § 3595(c)(2). In other "arbitrary factor" jurisdictions, courts have recognized that the need to prevent death sentences returned as a result of "arbitrary factors" requires an instruction accurately describing the possible sentences. *See, e.g., Parker,* 887 P.2d at 299; *Sonnier,* 379 So.2d at 1371-72. In a similar vein, courts have recognized that, where jury nonunanimity results in the imposition of a particular non-death sentence, the jury must be informed of that fact in order to avoid the arbitrary and capricious imposition of the death penalty based on speculation as to what the consequences of deadlock might be.[28] "[B]y allowing

[28] *See, e.g., State v. Williams,* 392 So.2d 619, 633-35 (La. 1980) (on rehearing); *Whalen v. State,* 492 A.2d 552, 562 (Del. 1985); *State v. Ramseur,* 106 N.J. 123, 308-12, 524 A.2d 188, 282-84 (1987). Although *Williams* and *Whalen* rely on the Eighth Amendment's prohibition of the arbitrary and capricious imposition of the death penalty, their reasoning applies *a fortiori* where, as here, a statutory scheme forbids the imposition of the death penalty under the influence of any "arbitrary factor." *Cf.*

the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court fail[s] to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action." *Williams,* 392 So.2d at 634-35. "To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possibly inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence." *Ramseur,* 106 N.J. at 311, 524 A.2d at 284.

The requested instruction was all the more necessary here, in order to correct the jury's mistaken – and highly damaging – belief that their failure to achieve unanimity would result in a less-than-life sentence. Inasmuch as the erroneous instructions interjected an "arbitrary factor" into these proceedings, the failure to give the corrective instruction perpetuated that arbitrariness, and likewise requires reversal under the FDPA.

The failure to give this corrective instruction also constitutes reversible error which is cognizable both under the FDPA's error correction prong (18 U.S.C. § 3595(c)(2)(C)) and in this Court's capacity as supervisor of the lower federal courts. The Court has previously reversed a federal conviction on the latter basis where a district court failed to give an accurate supplemental instruction to clear up jury confusion about the meaning of the court's charge. *See Bollenbach,* 326 U.S. at 610-15. The Court noted that, where difficulties in the charge are brought to the court's attention, "a trial judge should clear them away with concrete accuracy." *Id.* at 612-13. Especially since "[i]n death cases doubts such as those

Ramseur, 106 N.J. at 308-11, 524 A.2d at 282-83 (agreeing with *Williams* and *Whalen,* but adopting rule under supervisory power, not as constitutional mandate).

presented here should be resolved in favor of the accused," *Andres*, 333 U.S. at 752, the Court should hold that the failure to give the instruction at issue requires reversal of petitioner's death sentence.

2. Constitutional bases for reversal

Reversal of petitioner's sentence is required as a matter of constitutional law as well. The failure affirmatively to inform a capital sentencing jury about the consequences of nonunanimity in their sentencing recommendation renders a death sentence arbitrary and capricious in violation of the Eighth Amendment.[29] But the Court need not hold that such an instruction is required in every case in order to rule for petitioner here.

Because the instructions actually given created the inaccurate impression that a lack of unanimity would result in a less-than-life sentence imposed by the court, the failure to give this instruction left the jury critically misinformed about the consequences of their failure to agree. Under these circumstances, the Eighth Amendment required that petitioner's requested instruction be given. As Justice Souter has noted, "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been 'arbitrarily or discriminatorily' and 'wantonly and . . . freakishly imposed.' " *Simmons v. South Carolina*, 512 U.S. 154, 172-73 (1994) (SOUTER, J., concurring) (citations omitted). Petitioner's death sentence should

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[29] *See* authorities cited in Section II.B.1. and footnote 28, *supra*.

therefore be reversed as violative of the Eighth Amendment.[30]

In sum, it is at least reasonably likely that the jury labored under a critical misunderstanding of the consequences of jury nonunanimity. Because the Court has insisted that capital sentences must be reliable and based on accurate information, the Court should reverse petitioner's death sentence and remand to the Court of Appeals with instructions to "remand the case for reconsideration under section 3593 or imposition of a sentence other than death." 18 U.S.C. § 3595(c)(2).

III. THE SUMMARY ASSERTION OF HARMLESS ERROR BY THE COURT OF APPEALS, WITHOUT ANY ANALYSIS OR EXPLANATION BASED UPON THE RECORD, REQUIRES REVERSAL.

A. Introduction

In a weighing scheme like the FDPA, aggravating factors not only narrow the class of defendants **eligible** for the death penalty, but also guide the jury's decision on whether to **impose** the death penalty. *See Stringer v.*

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[30] The refusal to give the instruction at issue here is also a "procedural rule that ten[ds] to diminish the reliability of the sentencing determination" under *Beck v. Alabama*, 447 U.S. 625, 638 (1980). *Cf. Simmons*, 512 U.S. at 172-74 (SOUTER, J., concurring). Additionally, to the extent that the instructions actually given created an impermissible "all-or-nothing" choice like that condemned in *Beck*, the failure to give the corrective instruction perpetuated that error. *See* footnote 24, *supra*. Finally, the failure to give the corrective instruction meant that, on the basis of the misleading instructions actually given, petitioner was very likely sentenced to death based on "assumptions . . . which were materially untrue" or "on a foundation [which was] extensively and materially false," in violation of due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Black, 503 U.S. 222, 234-35 (1992). Under the FDPA, the sentencer must balance each aggravating factor found to exist against each mitigating factor found to exist; the jury may sentence the defendant to death only if all the aggravating factors found to exist outweigh all the mitigating factors found to exist. *See* 18 U.S.C. § 3593(e).

Although the Court of Appeals found that the jury in this case had relied upon two invalid nonstatutory aggravating factors in the weighing process, (J.A. 117-119), that court did not reverse and remand for a new sentencing hearing. Instead, the court summarily asserted that the error was harmless since the verdict would have been the same absent the invalid aggravating factors. (J.A. 122-123).

In making such a conclusory finding of harmless error, the Court of Appeals ignored 18 U.S.C. § 3595(c), which allows appellate courts to find "harmless error" only when the "Government establishes beyond a reasonable doubt that the error was harmless." The Court of Appeals also misapplied this Court's precedents which clearly require that, where an invalid aggravating factor is submitted to the jury, the reviewing court must make "a detailed explanation based on the record" to support a finding of harmless error. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *see also Stringer*, 503 U.S. at 230 (requiring "a thorough analysis of the role an invalid aggravator played in the sentencing process"); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'CONNOR, J., concurring) ("bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion").

The Court of Appeals did not discuss the aggravating and mitigating evidence, nor did it assess the weight the jury might have given to that evidence. Most significantly, the Court of Appeals did not discuss the eleven mitigating factors found by one or more jurors or the wealth of evidence that supported the findings of those mitigating factors. Instead, the Court of Appeals merely

asserted that the two valid aggravating factors "support[ed]" the sentence of death. Because the Court of Appeals asserted "harmless error" in the absence of "a principled explanation of how the court reached that conclusion," *Sochor, id.* at 541 (O'CONNOR, J., concurring), in violation of both § 3595 and the Constitution, petitioner's death sentence must be reversed.

B. The Court of Appeals Did Not Perform the Harmless Error Analysis Intended by Congress.

Under a weighing statute like the FDPA, where a sentencer relies upon an invalid aggravating factor or factors, the sentence itself is invalid and must be reversed, unless the reviewing court either reweighs the valid aggravating factors against the mitigating evidence or conducts harmless error analysis.[31] *See Clemons*, 494 U.S. at 741. In § 3595(c) of the FDPA, Congress specifically selected the latter option: "The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless."

Section 3595(c) thus incorporates the harmless-beyond-a-reasonable-doubt standard first articulated by the Court in *Chapman v. California*, 386 U.S. 18 (1967): namely, whether the government has proved beyond a reasonable doubt that the jury would have imposed a sentence of death had the two invalid factors not been

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[31] Although the Court has never precisely delineated the differences between the two concepts, they clearly are different. Harmless error analysis focuses on what a properly instructed jury would have done; reweighing on appeal permits the appellate court to make its own judgment after reweighing the remaining valid aggravating factors against the mitigating factors.

submitted, or, put another way, whether there is a reasonable possibility that the error might have contributed to the verdict. *See Chapman*, 386 U.S. at 24. In this case, that standard requires that, because there is a reasonable possibility that one or both of the invalid aggravating factors contributed to the verdict, the sentence must be reversed.

It is especially important that a reviewing court confronted with the problem of erroneous submission of invalid aggravating factors make a detailed review of the entire record. The Eighth Amendment guarantees to a capital defendant an "individualized determination" of his sentence, and the Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Moreover, Congress explicitly recognized the importance of appellate review under this statute. *See, e.g.*, 18 U.S.C. § 3595(c)(1) (court of appeals "shall address all substantive and procedural issues raised" on appeal). No doubt wishing to effectuate the Eighth Amendment's requirement of individualized sentencing, Congress plainly intended that harmless error review under the FDPA be conducted with at least the kind of detailed and thorough analysis and explanation required by *Clemons*, *Parker*, and *Sochor*.

The standard for harmless error review under the FDPA, then, is **not** whether a death sentence would have been **authorized** if there remain valid aggravating factors after removing any invalid aggravating factors.[32] Nor is the standard whether the court of appeals, in the exercise

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[32] Because a capital defendant is entitled under the Eighth Amendment to an individualized determination of his sentence, an appellate court in a weighing jurisdiction cannot rely upon the fact that there remain valid aggravating factors and thereby automatically affirm a death sentence. *See Clemons*, 494 U.S. at 752; *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Stringer*, 503 U.S. at 229-32.

of its own judgment, would consider death an **appropriate** sentence. The only way to conduct a proper harmless error review under the FDPA is to make a detailed explanation based upon the record as to why the jury would have imposed the same sentence absent the invalid aggravating factors. At a minimum, this requires a detailed explanation of the Court of Appeals' analysis and an articulation of how much weight it believed the jury assigned to each aggravating and mitigating factor.[33]

It is true that the Court of Appeals used the phrase "harmless error," and the court stated that the death sentence would have been imposed "had the invalid aggravating factors never been submitted to the jury." (J.A. 123). However, the court offered no explanation as to how it reached that conclusion. Proper harmless error analysis would have required the court to explain why the jurors would have reached the same result had they weighed the two remaining aggravating factors against the mitigating factors. But the court did not discuss the mitigating evidence at all, other than a bare reference to

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[33] For example, the Tennessee Supreme Court has held:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993) (footnote omitted), *cert. denied*, 510 U.S. 1215 (1994).

"the eleven mitigating factors found by one or more jurors." (J.A. 122). The Court held in *Clemons* that:

> because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence.

Clemons, 494 U.S. at 752. Similarly, in *Parker v. Dugger*, this Court emphasized the importance of considering mitigating evidence in conducting harmless error analysis: "Following *Clemons*, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. **What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record. . . .** " *Parker*, 498 U.S. at 320 (emphasis added). *See also Richmond v. Lewis*, 506 U.S. at 49 (state supreme court did not "even mention the evidence in mitigation").

Remarkably, the Fifth Circuit's opinion is **completely silent** with respect to the particulars of petitioner's mitigating evidence. In fact, there was an extraordinary amount of mitigating evidence in this case. Petitioner served for twenty-two years in the United States Army, retiring with an honorable discharge as a Master Sergeant in the Army Airborne Rangers. He served with distinction in two foreign conflicts, and was awarded a Meritorious Service Award and a Commendation Medal. And, the jury found that, unlike most capital defendants, "[petitioner] did not have a significant prior criminal record." (J.A. 54). The jury also found that petitioner's daughter would suffer emotional trauma if her father was executed, and that petitioner was remorseful and would likely be a well-behaved inmate. (J.A. 55)

Moreover, despite a horrible and traumatic childhood, which included regular sexual and physical abuse, petitioner managed, against overwhelming odds, to lead a successful and productive adult life. The defense offered compelling expert testimony of brain damage and psychiatric and psychological disorders, which combined to severely impair petitioner's ability to control his impulses on the night of the murder. And, the jury not only found that petitioner had proved **every** mitigating factor that he had submitted, but also found that petitioner's ex-wife was an additional mitigating factor. (J.A. 54-56).

In conducting harmless error analysis, the reviewing court should not ignore any of the mitigating factors that the jury found, or substitute its judgment for that of the jurors who found those mitigating factors. The fact that all jurors did not find these factors is irrelevant. The FDPA explicitly provides that if one juror finds that the defendant has proved a mitigating factor, that factor must be considered as part of the weighing process.[34] *See* 18 U.S.C. § 3593(d). Because the Court of Appeals mentioned none of this evidence in its summary conclusion that the error was harmless, the Court of Appeals did not perform

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[34] Because each juror makes an individual finding as to whether each mitigating factor has been proved, and because a sentence of death must be unanimous, the court of appeals should consider any mitigating factor found by at least one juror when determining whether the jury would have sentenced the defendant to death absent the invalid aggravating factors. *Cf. Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (in discussing materiality of *Brady* claims, holding that "given the unanimity required at the Louisiana punishment phase, the proper frame of reference . . . is whether the mind of one juror could have been changed with respect to the imposition of the sentence of death").

the harmless error analysis required by § 3595 and by the Eighth Amendment.

C. The Court of Appeals Incorrectly Assumed that Because the Invalid Aggravating Factors Were Nonstatutory, They Were Not Important in the Jury's Deliberations.

The Court of Appeals incorrectly assumed that, because the invalid aggravating factors in this case were "nonstatutory" rather than "statutory," those factors were not important in the jury's deliberations. In the one paragraph in which it discussed whether the error was harmless, the Court of Appeals emphasized that the two statutory aggravating factors found by the jury were valid:

> [I]f the jury had failed to find at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore the ability of the jury to recommend the death penalty hinged on a finding of at least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty. (J.A. 122).

The court concluded that the two remaining aggravating factors "support[ed]" the sentence of death.[35] (J.A. 122).

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[35] The use of the verb "support" indicates that the Court of Appeals answered the wrong question, namely, whether the jury legally **could** sentence petitioner to death. The question the Court of Appeals did not answer, the one it was legally obligated to answer, was whether the jury **would** have sentenced petitioner to death absent the invalid aggravating factors.

Although a death sentence is not authorized unless the jury finds at least one statutory aggravating factor, once the jury does find a statutory aggravating factor, **all** aggravating factors that the jury finds to be proved must be weighed in the decisional process. Once the jury found one statutory aggravating factor, it was legally obligated to make no distinction between "statutory" and "nonstatutory" aggravating factors. The jurors were instructed that they "**must** weigh **any** aggravating factors that [they] unanimously f[ound] to exist – **whether statutory or nonstatutory**. . . . " (J.A. 43) (emphasis added).

Contrary to the lower court's assumption, therefore, nonstatutory aggravating factors can have a profound impact under the FDPA, because they are weighed alongside statutory aggravating factors in the decision between life and death. In this weighing process, jurors may choose to assign greater weight to a nonstatutory aggravating factor than to any or all of the remaining statutory aggravating factors and mitigating factors in the case. The FDPA quite specifically requires that the jury consider each aggravating factor that it finds beyond a reasonable doubt (and the judge so instructed the jury in this case). The Court of Appeals erred in concluding that the two invalid aggravating factors did not affect the verdict.

D. The Proper Remedy is to Remand for a New Sentencing Before a Jury.

Because the Court of Appeals failed to articulate the basis of its conclusion that the error was harmless, the sentence must be reversed. Moreover, on the record in this case, it is simply not possible to conclude beyond a reasonable doubt that the jury would have sentenced the defendant to death without the submission of the two invalid aggravating factors. Accordingly, the proper remedy on this record is not to remand to the Court of

Appeals to conduct harmless error analysis. Instead, the case should be remanded for a new sentencing hearing before a jury. *See* 18 U.S.C. § 3595(c)(2).

Had the Court of Appeals actually conducted proper harmless error analysis, the record in this case could not support a finding beyond a reasonable doubt that a properly instructed jury, not relying upon the two invalid aggravating factors, would have reached the same decision. This was a close and difficult decision for the jurors. First, the jury's refusal to find several of the aggravating factors submitted by the government indicates that the jury's decision was anything but a foregone conclusion.[36] Moreover, even with the two invalid aggravating factors weighed in the balance, the jury still deliberated for a day and a half. The two juror affidavits provide a window into how difficult and close the decision was. And, as shown above, the jury was instructed erroneously about the consequences if the jury was not unanimous as to either death or life without possibility of release. This error further skewed the deliberations, and makes it especially difficult to rely upon the jury's actual verdict to speculate whether a properly instructed jury would have reached the same decision.

In short, the record in this case makes harmless error analysis "extremely speculative or impossible." *See Clemons*, 494 U.S. at 754 (noting that an appellate court "may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible"). Accordingly, the Court should

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[36] The jury refused to find that petitioner committed the offense after substantial planning and premeditation; it refused to find that he knowingly created a grave risk of death to one or more persons in addition to the victim; and it refused to find that petitioner constitutes a future danger to the lives and safety of other persons. (J.A. 51-53).

reverse the judgment of the Court of Appeals and remand for a new sentencing hearing before a jury.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

18 U.S.C. § 1201(a)

§ 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties;

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

APPENDIX B

18 U.S.C. §§ 3591-3598

§ 3591. Sentence of death

(a) A defendant who has been found guilty of –

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 –

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing

held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of –

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

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§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) Mitigating factors. – In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

> **(1) Impaired capacity.** – The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
>
> **(2) Duress.** – The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
>
> **(3) Minor participation.** – The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
>
> **(4) Equally culpable defendants.** – Another defendant or defendants, equally culpable in the crime, will not be punished by death.
>
> **(5) No prior criminal record.** – The defendant did not have a significant prior history of other criminal conduct.

> **(6) Disturbance.** – The defendant committed the offense under severe mental or emotional disturbance.
>
> **(7) Victim's consent.** – The victim consented to the criminal conduct that resulted in the victim's death.
>
> **(8) Other factors.** – Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason. – In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

> **(1) Prior espionage or treason offense.** – The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.
>
> **(2) Grave risk to national security.** – In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.
>
> **(3) Grave risk of death.** – In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide. – In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime. – The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 36 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm. – For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized. – The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses. – The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons. – The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense. – The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment. – The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain. – The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation. – The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) Conviction for two felony drug offenses. – The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) Vulnerability of victim. – The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses. – The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors. – The defendant committed the offense in the course of engaging in a continuing criminal enterprise in

violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials. – The defendant committed the offense against –

> **(A)** the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;
>
> **(B)** a chief of state, head of government, or the political equivalent, of a foreign nation;
>
> **(C)** a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or
>
> **(D)** a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution –
>
> > **(i)** while he or she is engaged in the performance of his or her official duties;
> >
> > **(ii)** because of the performance of his or her official duties; or
> >
> > **(iii)** because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation. – In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings. – The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty. – In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized. – The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses. – The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction. – The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm. – In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substance Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct

proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) Using minors in trafficking. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) Lethal adulterant. – The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

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§ 3593. Special hearing to determine whether a sentence of death is justified

(a) Notice by the government. – If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of

guilty, sign and file with the court, and serve on the defendant, a notice –

> **(1)** stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
>
> **(2)** setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury. – If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted –

> **(1)** before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if –

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors. – Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial

judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings. – The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special

findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death. – If, in the case of –

> **(1)** an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;
>
> **(2)** an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or
>
> **(3)** an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a

sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination. – In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

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§ 3594. Imposition of a sentence of death

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

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§ 3595. Review of a sentence of death

(a) Appeal. – In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) Review. – The court of appeals shall review the entire record in the case, including –

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) Decision and disposition. –

(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592.

(2) Whenever the court of appeals finds that –

(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government

establishes beyond a reasonable doubt that the error was harmless.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

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§ 3596. Implementation of a sentence of death

(a) In general. – A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) Pregnant woman. – A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) Mental Capacity. – A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental

capacity to understand the death penalty and why it was imposed on that person.

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§ 3597. Use of State facilities

(a) In general. – A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

(b) Excuse of an employee on moral or religious grounds. – No employee of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service, and no employee providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee. In this subsection, "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

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§ 3598. Special provisions for Indian country

Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.

No. 97-9361

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

2. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

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LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

After a jury trial in the Northern District of Texas, petitioner was convicted of the capital offense of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1201, and of the non-capital offense of assaulting a different victim, in violation of 18 U.S.C. 113. After a separate sentencing hearing, the jury recommended that petitioner be sentenced to death for the capital offense. J.A. 57-58, 84, 88. The district court sentenced petitioner to death on the capital count and to 57 months of imprisonment on the non-capital count. The court of appeals affirmed. J.A. 82-123.

1. Petitioner kidnapped and bludgeoned to death Tracie Joy McBride, a 19-year old Army private who had been transferred to Goodfellow Air Force Base in San Angelo, Texas, just eight days before her kidnapping and murder. On the evening of Saturday, February 18, 1995, petitioner abducted McBride from a building on the Base in which she had been doing her laundry. 16 R. 816, 864-868, 875-880, 887. Army Pvt. Michael Peacock witnessed the kidnapping and tried to prevent it, but petitioner struck him on the head

with a handgun and left him bloodied and unconscious. 16 R. 883-884, 900-902, 904-908; 23 R. 2310.

Petitioner then brought McBride back to his house, where he raped and sodomized her. (Although petitioner told a defense psychiatrist that the abducted McBride willingly engaged in sexual relations, 23 R. 2316, the injuries and trauma to McBride's genital area were not consistent with consensual sex. 17 R. 1141-1142.) Petitioner later forced McBride into his bedroom closet, where he tied her up with white nylon rope and used two socks to gag her. 16 R. 957; 23 R. 2319-2320. At approximately 10:00 p.m., while McBride was in the closet, petitioner was visited by a friend named Margaret Rodriguez. 17 R. 1010. Petitioner made sexual advances (which Rodriguez rejected) and said he had to wash himself. 17 R. 1011-1014. Rodriguez, who left a short while later, testified that the bedroom door was closed and that she heard no sounds from inside. 17 R. 1017.

Petitioner decided to kill McBride after Rodriguez left because McBride had heard Rodriguez mention his name. 16 R. 957. After forming that plan, petitioner washed McBride's clothes and made her clean herself to remove evidence of the rape. 21 R. 2030-2031; 23 R. 2325. Petitioner then made McBride walk out of the house on towels that he had placed on the floor, because he believed that, if she did so, no fibers from his residence would be on her clothes or boots. 23 R. 2328. Petitioner forced McBride into his car, drove until he reached a remote bridge some 20 miles away, J.A. 83-84, and struck McBride several times on the head while she was still in the car. 16 R. 957-958. McBride apparently had not yet lost consciousness, and petitioner led her underneath the bridge. 16 R. 958. There, petitioner struck her again until she fell, and he continued to strike her several more times after she was down, shattering her skull and killing her. *Ibid.*

McBride's dead body was not found, and petitioner was not apprehended, until two weeks later. On March 1, 1995,

petitioner was arrested after his ex-wife Sandra Lane (who was also McBride's drill sergeant) filed a complaint charging that petitioner had kidnapped and sexually assaulted her two days before McBride's abduction. 16 R. 962-965. After being advised of his *Miranda* rights, petitioner admitted that he had kidnapped and murdered McBride. 16 R. 948, 955-958. In the early morning hours of March 2, 1995, petitioner directed law enforcement agents to a bridge 20 miles outside San Angelo, under which McBride's dead body was found. 16 R. 952-954.

The medical examiner testified that McBride died from "injuries to the head and brain." 17 R. 1159. There were at least nine major lacerations to McBride's head, consistent with her having been struck repeatedly with a tire iron or similar tool. 17 R. 1157. Splattered blood on the walls and ceiling of the bridge underneath which McBride's dead body was found also suggested that she had repeatedly been struck by a blunt instrument. 17 R. 1065-1066. Large pieces of bone were missing from underneath McBride's scalp, and her brain was exposed. 17 R. 1136, 1154. The medical examiner opined that it would have taken "a tremendous amount of force" to cause those fatal injuries: "We hardly even see that with our major traffic accidents." 17 R. 1154.

2. A special jury sentencing hearing was held on the capital count in accordance with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.* The jury found, beyond a reasonable doubt, that petitioner intentionally killed McBride and also that he intentionally inflicted serious bodily injury that resulted in her death. J.A. 85. The jury next found beyond a reasonable doubt two of four statutory aggravating factors alleged by the government: that petitioner caused the death during commission of another crime (kidnapping), and that petitioner committed the offense in an especially heinous, cruel, and depraved manner. See 18 U.S.C. 3592(c)(1) and (6) (1994 & Supp. II 1996); J.A. 86. The jury also found beyond a reasonable doubt two of three non-

statutory aggravating factors that the government had alleged: McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and McBride's "personal characteristics and the effect of the offense on her family." The jurors individually decided whether any mitigating factors, including the 11 factors proposed by the defense, existed. One or more jurors found the existence of ten of the 11 proposed factors, and seven jurors found the existence of an additional mitigating factor. Finally, the jury weighed the aggravating factors against the mitigating factors, J.A. 86-88 & n.3, and unanimously recommended that petitioner be sentenced to death. J.A. 88. The district court followed that recommendation and imposed a death sentence on the capital count. See 18 U.S.C. 3594.

3. Petitioner appealed the sentence, and the court of appeals affirmed. J.A. 82-123. After addressing other issues that petitioner has not renewed before this Court, J.A. 88-96, the court of appeals rejected several challenges by petitioner to the jury instructions. First, the court of appeals rejected petitioner's contention that the trial court erred by not instructing the jury that its failure to reach a unanimous recommendation on the death penalty would result in the court automatically imposing a life sentence without possibility of release. See J.A. 96-98 & n.8, 103. The court concluded that the instructions proposed by petitioner were legally incorrect, because a hung jury on the death penalty could result in empanelment of a new sentencing jury: "life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered." J.A. 97. The court further explained that "federal courts have never been affirmatively required to give such instructions." J.A. 103. The court therefore held that "no constitutional violation occurs when a district court refuses to inform the

jury of the consequences of failing to reach a unanimous verdict." *Ibid.*

The court also declined to reverse petitioner's sentence based on his challenges to instructions that, he asserted, misled the jury. J.A. 98-106. The court rejected petitioner's argument that the instructions produced a reasonable likelihood that jurors would have believed that the trial court would automatically impose a sentence of less than life imprisonment in the event of jury deadlock:

> Reading the instructions in their entirety, the [trial] court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement [each time the court mentioned the lesser sentence option in the instructions].

J.A. 102.

The court of appeals also rejected petitioner's argument that "the disparity of the verdict forms," which had to be signed by all 12 jurors in the event of a death or life imprisonment recommendation but only by the foreperson in the event of a lesser recommendation, would have misled the jury about the consequences of deadlock on the death sentence. J.A. 102-103. Noting that petitioner did not object to the verdict forms, the court found no plain error because "any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." *Ibid.* Finally, the court rejected, as precluded by the rationale of Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits in an attempt to show that jurors in fact were confused by the instructions. J.A. 104-105.

The court also rejected petitioner's claim that the trial court committed plain error by allowing the jury three options—death, life imprisonment without release, or some other lesser sentence. J.A. 106-111. After examining "the disparate sentencing options" described in the FDPA, 18 U.S.C. 3593(e), which provides for all three possibilities, and the kidnapping statute, 18 U.S.C. 1201, which provides only for death or life imprisonment, the court concluded that "the substantive criminal statute [i.e., the kidnapping statute] takes precedence over the death penalty sentencing provisions." J.A. 110. The court also found that, because parole and early good time release for life offenders have been abolished in the federal system, "no meaningful distinction exists between 'life' [as mandated by the kidnapping statute] and 'life without the possibility of release.'" *Ibid.* Although the court held that "the district court committed error by informing the jury of the lesser sentence option available under § 3593," the court declined to find that the mistake constituted plain error because no "clearly established law" resolved the issue, and "the error was not * * * obvious, clear, readily apparent, or conspicuous." J.A. 110-111.

The court next rejected petitioner's challenges to the two statutory aggravating factors found by the jury—that petitioner caused the death during commission of another crime (kidnapping) and that petitioner committed the offense in an especially heinous, cruel, and depraved manner that involved torture and serious physical abuse. J.A. 111-117. In contrast, the court held that the two non-statutory aggravating factors found by the jury—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the offense on her family"—were invalid, both because they were "duplicative" of each other and because they were "vague and overbroad." J.A. 117-119.

Although the court held that the non-statutory aggravating factors found by the jury were not valid, the court concluded that the jury's consideration of those factors was harmless beyond a reasonable doubt. J.A. 119-123. The court explained that, "[u]nder a weighing statute [such as the FDPA], affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." J.A. 119-120. After detailing the possible methods of appellate analysis, the court decided to "redact the invalid aggravating factors" and "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors." J.A. 121. The court explained that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury," whereas "jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty." J.A. 122. "[E]ven after considering the eleven mitigating factors found by one or more jurors," the court concluded, the erroneous nonstatutory aggravating factors were "harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." J.A. 122-123.

SUMMARY OF ARGUMENT

I. The jury instructions in this case correctly informed the jury that, to return a penalty recommendation, it had to be unanimous. The instructions did not, as petitioner claims, lead the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment. At the outset of its description of the weighing process, the court informed

the jury of its penalty options—to recommend death, life without the possibility of release, or some lesser sentence—and stated that each required unanimity. Although the court did not repeat the word "unanimous" in each later reference to the option of recommending a lesser sentence, the court did not state or imply that a court-imposed lesser sentence would result from a hung jury. The court said nothing about the result of a hung jury at all. Nor would the instructions and verdict forms have left the jury with the impression that the jury was compelled to recommend a lesser sentence if the jurors found themselves irreconcilably divided between death and life without release. The notion that the jury as a whole would be required to recommend a more lenient sentence than any juror desired is counterintuitive, and no language in the instructions implied such a requirement. When the instructions are read as a whole, the ambiguity that petitioner perceives disappears, and there is no "reasonable likelihood" that the instructions misled the jury.

Relief is particularly unwarranted here because petitioner did not make his present objection before the jury retired to deliberate. Under those circumstances, he must show plain error, *i.e.*, an obvious error that caused him prejudice. He cannot make that showing, because there was no clear error and because the instructions were as likely to have helped as to have harmed him. Nor is he aided by affidavits purporting to describe the jury's deliberations; here, as elsewhere, such post-verdict recollections are properly excluded from judicial review. And he errs in claiming that he preserved the error here by proposing a different instruction or that plain-error limitations are rendered inapplicable by the FDPA's provision for review of any "arbitrary factor." Petitioner's claim is one of legal error in the instructions given, and that claim was not properly preserved in the trial court. Because the claim is inconsistent with the instructions as a whole, the claim entitles him to no relief.

II. Petitioner was not entitled to an instruction that the court would impose a sentence of life imprisonment without release if the jury could not unanimously agree on a sentencing recommendation. First, such an instruction is not a correct statement of the law. The FDPA directs that the sentencing jury must act unanimously to recommend a sentence, and it accommodates the background principle that, following a hung jury, the government is entitled to empanel a new jury. A hung jury, therefore, does not necessarily require the court to impose a sentence of life without release. Second, even if petitioner's reading of the FDPA were correct, there is no basis in the statute, this Court's supervisory authority, or the Constitution to require an instruction about the consequences of deadlock. Society has a strong interest in encouraging the jury to deliberate with a view toward reaching a unanimous sentencing decision, because such a verdict enables the jury to express the conscience of the community on the ultimate question whether a capital defendant should live or die. A jury charge on the consequences of deadlock threatens to undermine deliberations seeking unanimity. It is therefore inconsistent with the purposes and traditions of our jury system.

III. Petitioner is not entitled to relief on the theory that the submission of two non-statutory aggravating factors that the court of appeals found vague and duplicative was harmful, rather than harmless, error. As an initial matter, the factors in question were neither vague nor duplicative. Rather, they were constitutionally valid means of guiding the jury to consider the victim's vulnerability and the impact of petitioner's crime on the victim and her family. Both considerations are entirely proper ones for a capital sentencing jury to weigh. Even on the assumption that the factors were invalid, the submission of them to the jury was harmless beyond a reasonable doubt. The jury clearly would have returned the same verdict if those two non-statutory aggravating factors had been more precisely defined.

Alternatively, as the court of appeals found, the verdict would have been the same if the factors had never been submitted to the jury. Although the court of appeals' discussion of harmless error is brief, its stated reasons sufficiently support its conclusion that the error (if any) in submitting the two non-statutory aggravating factors was harmless beyond a reasonable doubt.

ARGUMENT

I. THE JURY INSTRUCTIONS DID NOT LEAD THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD AUTOMATICALLY RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT

Petitioner contends (Br. 17-32) that his sentence must be reversed because, in his view, the jury instructions and verdict forms improperly led the jury to believe that if the jury deadlocked on the penalty recommendation, the court would automatically impose a sentence of less than life imprisonment without possibility of release (life without release). The jury instructions contain no express statement to that effect. Petitioner argues, however, that the jury would have formed such an "impression" by drawing "inference[s]" from the instructions and by comparing the language used to describe the jury's possible verdicts in different parts of the instructions and verdict forms. Pet. Br. 20-24.

A defendant who claims on appeal that the jury instructions are susceptible of an erroneous interpretation must demonstrate "a reasonable likelihood that the jury has applied the challenged instruction[s]" erroneously. *Boyde* v. *California*, 494 U.S. 370, 380 (1990); *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991). Such a claim requires the assessment of the jury instructions not "in artificial isolation, but * * * in the context of the overall charge," *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), and "with the commonsense understanding of the instructions in the light of all that has taken place at the trial." *Boyde*, 494 U.S. at 381. The burden is even heavier here because petitioner did not object to the relevant instructions or verdict forms in the district court. See *United States* v. *Park*, 421 U.S. 658, 676 (1975). He therefore must show: "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights'" and that "(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)).

Petitioner cannot meet those burdens. The jury instructions and verdict forms, interpreted as a whole and in a common-sense fashion, do not give rise to a reasonable likelihood that the jury would have thought that its inability to return a unanimous verdict of death or life without release required it to recommend, or the court to impose, a "lesser sentence." Especially in light of petitioner's higher burden under the plain error standard, his "court-imposed-lesser-sentence" claim does not justify invalidating the jury's unanimous recommendation of a capital sentence.

A. Petitioner Has Not Demonstrated A Reasonable Likelihood That The Jury Instructions And Verdict Forms Misled The Jury

Petitioner argues that the jury was reasonably likely to have drawn "two separate, though related," conclusions from the instructions and verdict forms about what would happen if it failed to reach a unanimous recommendation of a sentence of death or life without release: first, the judge would have to impose a sentence less severe than life without release; and, second, the jury itself would be required to recommend a sentence less severe than life without release.

Pet. Br. 20. No "reasonable likelihood" exists that the jury would have read the instructions that way.[1]

1. The interpretational issue centers on the instructions that the court gave the jury about the weighing phase of the sentencing proceedings. The court instructed the jury that, based on weighing the aggravating and mitigating factors found to exist:

> [Y]ou the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.
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> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.
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> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of

[1] Petitioner suggests that a less demanding standard than "reasonable likelihood" applies to challenges to instructions on direct appeal of federal capital cases. See Pet. Br. 18-19 n.12 (relying on *Andres* v. *United States*, 333 U.S. 740 (1948)). In *Boyde*, however, the Court "made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that had previously been used by this Court." *Estelle*, 502 U.S. at 72-73 n.4. The Court in *Boyde* cited *Andres* as a case that had used one of the different phrasings that the "reasonable likelihood" standard was intended to supersede, see 494 U.S. at 379, and it gave no indication that the "reasonable likelihood" standard would not apply to federal capital cases like *Andres* and this one.

> release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.

J.A. 43-44.

Relying on the last sentence quoted above, petitioner argues (Br. 21) that the court "told the jury in no uncertain terms that the jury's failure to agree on a sentence of death or life without the possibility of release would result in the court's imposing sentence." Petitioner also contends (*ibid.*) that "a natural inference is that the court's sentence would be such a 'lesser sentence'" because the lesser-sentence option was mentioned previously. And he argues (*ibid.*) that the inference was strengthened because, four paragraphs later, after discussing the jury's responsibility to make credibility determinations, to decide the case on the evidence without passion or prejudice, and to weigh the aggravating and mitigating factors in a non-mechanical fashion, the court reiterated that jury recommendations of death or life without release had to be unanimous but did not mention a third sentencing option. See J.A. 45.[2]

[2] Petitioner also states that, in light of the available sentences for his kidnapping crime, the inclusion of any lesser-sentence option in the instructions was error (Br. 17-18, 19 n. 13). He does not contend, however, that the instructions' erroneous reference to a lesser sentence by itself warrants reversal of his capital sentence. Br. 18-19. Although we agree with petitioner that the only sentences that could have been imposed are death and life without release (because the kidnapping statute, 18 U.S.C. 1201, authorizes only death and life imprisonment, and neither parole nor

2. There is no reasonable likelihood that the jury parsed the instructions in that fashion. At the start of the instructions on the weighing phase, the court explained in the clearest possible terms that the jury should recommend one of three possible sentences and that any of those three recommendations had to be unanimous. See J.A. 43 ("you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence"). The court went on to explain that jury recommendations of death or life without release would be binding on the court, but a jury recommendation of "some other lesser sentence" would not. Such a recommendation would, instead, authorize the court to impose any lawful sentence other than death. J.A. 44 ("If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law."). Immediately afterwards, the court instructed the jury that, in deciding among those three recommendations, the jury should not concern itself with the sentence that the court would impose if the jury chose the third option. *Ibid.* ("In deciding what recommendation to make, you are not to be

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good-time credits could reduce the life sentence), that conclusion was certainly not settled at the time of trial and, even today, is not beyond all dispute. See J.A. 110-111. In view of the fact that petitioner expressly requested the court to include the lesser-sentence option in the instructions at "each and every time during the body of the court's instructions wherein that noted language [*i.e.*, the jury determines whether the defendant should be sentenced to death] is used," J.A. 26, as well as the fact that petitioner could have derived strategic advantages from that option, see pp. 21-25, *infra*, there is no basis for finding the lesser-sentence language, by itself, to be grounds for reversal here.

concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.").

The cumulative meaning of those instructions is that (1) the jury could make its sentencing recommendations only by acting unanimously; (2) two types of recommendations (death or life without release) would dictate the court-imposed sentence, but the third type (lesser sentence) would not; (3) if the jury made the third recommendation, the court would impose an "authorized sentence," not necessarily a "lesser sentence"; and (4) the jury was not to consider at all what the court would do in the event that the court was acting as sentencer. The instructions do not address the effect of a hung jury, and they do not state that the jury could make any sentencing recommendation non-unanimously.

In light of the instructions as a whole, when the court stated that the sentence "is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended" (J.A. 44), the jury is not reasonably likely to have inferred that the court would impose a "lesser sentence" if the jury hung. The quoted statement came on the heels of the instruction that the jury must act unanimously in making a sentencing recommendation, and nothing in the instructions indicated that the court would impose sentence in the absence of a unanimous jury recommendation. In contrast, the jury instructions had earlier expressly addressed a situation in which the jury could act non-unanimously. In discussing mitigating factors, the court pointedly noted that, in contrast to the requirement of unanimity on findings of aggravating factors: "Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating

factor may be made by any one or more of the members of the jury * * * regardless of the number of other jurors who agree that such mitigating factor has been established." J.A. 43. Given the court's direct attention to the distinction between required unanimous actions and permissible non-unanimous actions, the jury would reasonably have expected the court to underscore and make explicit any situation in which non-unanimity produced sentencing results. The jury would not have taken its cue from the "subtle shades of meaning" argued by petitioner. *Boyde*, 494 U.S. at 381.[3]

3. There is no greater merit in petitioner's argument (Br. 21-24) that the instructions and verdict forms suggested that the jury itself was required to recommend a sentence less severe than life without release if the jury was hung on the life-or-death decision. Petitioner relies (Br. 23-24) on the verdict forms, which, he notes, required a unanimous vote and the signatures of all jurors for a recommendation of death or life without release, but required only the foreperson's signature for a jury recommendation of a lesser sentence. J.A. 57-59. He also claims (Br. 24) that the judge's instructions about the forms would have led jurors to conclude that a "deadlock as to penalty would require them to return the verdict form with Decision Form D [the lesser-sentence option] signed by the jury foreperson."

Petitioner's claim that the jury is reasonably likely to have read the instructions to require that the jury as a whole recommend a sentence that not one single juror individually supported is counterintuitive. The jurors are not likely to

[3] For the same reason, petitioner is not assisted by the observation (Br. 21) that, when the instructions later reiterated the unanimity requirement for jury recommendations of death or life without release (see J.A. 45), the instructions omitted to state that the jury could recommend a lesser sentence, but only unanimously. The jury would not have attached any significance to the omission, because the court had already stated quite clearly that the jury could make any of three recommendations, and any recommendation had to be unanimous. J.A. 43.

have concluded that the judge would direct them to recommend a sentence more lenient than any of them desired. It is far more likely that the jury instead would have understood that, if it could not reach a unanimous recommendation on death or life because its members were divided on that issue, it should report that fact to the court. The language of the instructions lacks any clear and definite indication that might have led jurors to infer the contrary conclusion, with the strange result that disagreement on the two most severe penalties would require them all to recommend a lesser one.

The court stated as follows about the verdict forms:

> The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not unanimously find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors, you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.
>
> Decision Form D should be used if you recommend that some other lesser sentence should be imposed.

J.A. 47-48. Those instructions contain no language requiring a jury divided between life and death to recommend a lesser sentence. Although the court did not use the word "unanimously" in mentioning Decision Form D, the jurors would not have thought that the omission negated the court's prior unequivocal requirement of jury unanimity for any verdict. The jury instructions previously stated that "you the jury, by unanimous vote," shall recommend any of the three sentencing options. J.A. 43. Moreover, only three paragraphs before describing the verdict forms, the court had noted that "[i]t is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so." J.A. 46. Petitioner's conclusion that, under the instructions, a hung jury would have had to subscribe to a lesser-sentence recommendation ignores the court's express instruction that a lesser-sentence recommendation must be unanimous and that the jury should deliberate with a view toward reaching unanimous agreement.[4]

Petitioner asserts (Br. 24) that *Mills* v. *Maryland*, 486 U.S. 367, 383 (1988), stands for the proposition "that 'juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so.'" That reading of *Mills* is neither accurate nor in accord with other authority. The Court in *Mills* stated only that juries do not leave blanks or report themselves deadlocked "over mitigating circumstances" (*ibid.*), not that they do not

[4] Petitioner also puts more weight on the differences in the signature requirements of the verdict forms than those differences can bear. Although the lesser-sentence form required only the foreperson's signature, in other instances, the foreperson alone signed the verdict forms to report the jury's findings even though those findings clearly had to be unanimous. See J.A. 50-53 (only foreperson's signature required to indicate jury's unanimous finding of the existence of aggravating factors). And the lesser-sentence form itself referred to a sentence that "[w]e the jury recommend"—not to a sentence recommendation that reflected only the jury's inability to agree on which greater sentence to recommend.

report themselves deadlocked over the ultimate sentence. Moreover, in *Mills*, the jury was not instructed that unanimity was required to reject a mitigating circumstance. See *id.* at 379. Here, in contrast, the jury was instructed that unanimity was required to recommend a lesser sentence. See J.A. 43. The jury in this case was also instructed to make "an effort to reach agreement if you can do so * * *. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with." J.A. 46. Juries typically receive no more pointed instructions than those on what to do if they cannot agree on a verdict. Yet juries nonetheless frequently report themselves deadlocked on that ultimate issue—a fact that is evidenced by the continued vitality, in one form or another, of the supplemental charge that this Court approved in *Allen* v. *United States*, 164 U.S. 493, 501 (1896), to urge juries that report themselves deadlocked to deliberate further. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 & n.1 (1988) (some form of *Allen* charge employed in every federal court of appeals).

4. In sum, petitioner's argument reduces to the proposition that a concededly correct specific instruction requiring jury unanimity for each of the jury's three possible sentencing options was fatally undercut by ambiguous inferences arising from the court's later omissions of the unanimity instruction in referring to the third sentencing option. He cites no authority, however, holding that an express instruction can be rendered unclear by ambiguous inferences drawn from other instructions. To the contrary, this Court has held that even affirmative instructions that might be "ambiguous in the abstract" can be cured when read "in conjunction with [other instructions]." *Victor* v. *Nebraska*, 511 U.S. 1, 14-15 (1994) (problematic "moral certainty" language in reasonable doubt instruction cured by remainder of instruction); see also *Estelle*, 502 U.S. at 74-75 (although "instruction was not as clear as it might have

been," there was no reasonable likelihood that jury interpreted it as pure propensity instruction given another specific instruction that "guarded against possible misuses of the [challenged] instruction"); *Bryan* v. *United States*, 118 S. Ct. 1939, 1949 (1998) (single instruction that "read by itself, contained a misstatement of the law," would not likely have misled jurors "in the context of the entire instructions"). Likewise, courts of appeals have held that "one ambiguous part of an instruction may be made clear by another unambiguous part of the same instruction." *United States* v. *Gaviria*, 116 F.3d 1498, 1510, 1511 (D.C. Cir. 1997) (per curiam) ("[I]f a sentence can mean either A or B and another sentence in the instruction clearly says A, then one does not say that the first sentence must mean B; one says, rather, that the first sentence must therefore also mean A."), cert. denied, 118 S. Ct. 865 (1998); *United States* v. *Eltayib*, 88 F.3d 157, 170-71 (2d Cir.) (finding no plain error when "even if the instruction may be deemed ambiguous with regard to a finding that the defendants participated in the conspiracy, another instruction made it clear that the finding of participation had to be explicit"), cert. denied, 117 S. Ct. 619 (1996). In light of those principles, there is no basis for holding that the express unanimity instruction was overcome by subsequent omissions that, at worst, are ambiguous in the abstract.

B. Petitioner Did Not Object To The Instructions And Cannot Show That They Rise To The Level Of Plain Error

Reversal of petitioner's death sentence based on his "lesser sentence" claim would be particularly unwarranted in light of the plain error rule. Fed. R. Crim. P. 52(b). Petitioner failed to object to the relevant instructions and verdict forms before their submission to the jury, see Fed. R. Crim. P. 30, and thus cannot prevail unless he can establish an obvious error, which resulted in prejudice, and which justifies relief as a matter of the court's discretion. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Petitioner has not carried that burden.

1. Given the complexities in petitioner's reading of the jury instructions, his claim of error is hardly "clear" or "obvious" within the meaning of the plain-error rule. *Olano*, 507 U.S. at 734. Indeed, the absence of a contemporaneous objection suggests that "the participants in the trial did not perceive the challenged instruction in the manner [petitioner] now proffers." *Waters* v. *Thomas*, 46 F.3d 1506, 1527 n.9 (11th Cir.), cert. denied, 516 U.S. 856 (1995).

Nor can petitioner meet his burden of showing prejudice. *Olano*, 507 U.S. at 734. Petitioner contends that he was prejudiced by the instructions because the jurors may have compromised on a death sentence to avoid the possibility that their failure to agree would lead to a sentence less severe than life without release. "[T]he almost invariable assumption of the law," however, is "that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Here, the district court instructed the jury: "In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release." J.A. 44. The jury is presumed to have followed that instruction. See, *e.g.*, *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (jury presumed to have followed instruction not to consider consequences of finding defendant not guilty by reason of insanity). Thus, even if the jury had believed that the court would impose a lesser sentence if the jury reported itself deadlocked, the instructions required it to set aside what the court might do and report that it was unable to agree, if in fact that was the case. Alternatively, if the jury had believed that its only option, upon the failure to agree unanimously on death or life without release, was to return a (non-unanimous) lesser sentence recommendation, it should have returned that recommendation if it in fact

failed to agree. That result would have been to petitioner's benefit.

Even if the jury disregarded its instructions and allowed its recommendation to be influenced by an erroneous understanding of the effect of deadlock, petitioner cannot establish prejudice. As the court of appeals noted, "the outcome could just as easily have turned out the other way with the jurors not supporting the death sentence convincing the death-prone jurors to impose life without the possibility of release." J.A. 106. When the effect of any error is so uncertain, petitioner cannot meet his burden to show actual prejudice. *Olano*, 507 U.S. at 739-740; cf. *Romano* v. *Oklahoma*, 512 U.S. 1, 14 (1994) (rejecting claim that improperly admitted evidence rendered sentencing fundamentally unfair because "[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so").

In an effort to show prejudice, petitioner has submitted two affidavits purporting to show that some jurors agreed to the death recommendation because they were concerned that a hung jury would result in a sentence less severe than life without release. See J.A. 66-68, 78-79. The court of appeals correctly ruled that petitioner could not rely on those affidavits to undermine the jury's verdict.[5] Post-trial juror affidavits regarding internal deliberations, and the effect of instructions on those deliberations, are precluded by Federal Rule of Evidence 606(b). Although the rules of evidence are not applicable to capital sentencing proceedings, see Fed. R. Evid. 1101(d)(3), Rule 606(b) codifies a

[5] Petitioner did not seek, nor did this Court grant, certiorari on that distinct legal issue. Compare Pet. (i) (Questions Presented) and Pet. Reply Br. 7 n.4 (claiming the juror affidavit issue was fairly included) with J.A. 126 (limiting questions presented). Therefore, this Court should not review the ruling of the court of appeals that the affidavits cannot be used "to undermine the jury verdict." J.A. 104. See Sup. Ct. R. 14.1(a), 24.1(a); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

longstanding rule of federal practice predating enactment of the federal rules. See *Tanner* v. *United States*, 483 U.S. 107, 121 (1987); *Mattox* v. *United States*, 146 U.S. 140 (1892) (applying rule in federal capital case and admitting affidavits concerning *external* influence). The policies behind Rule 606(b) and the pre-codification rule apply with equal strength to capital sentencing proceedings. Use of juror affidavits to impeach a sentence would promote harassment of jurors, chill frankness and freedom of discussion in the jury room, deter jurors from returning unpopular verdicts, undermine the community's trust in a system that relies on the decisions of lay-people, and disrupt the finality of capital sentencing. See *Tanner*, 483 U.S. at 120-121; *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915).

The requirement of heightened reliability in death penalty cases, on which petitioner relies (Br. 25 n.19), in fact supports application of the rule in capital sentencing. There is no reason to assume the accuracy of the statements in the affidavits on which petitioner relies, and there may be reason to question it. As the court of appeals explained:

> Jury deliberations entail delicate negotiations where majority jurors try to sway dissenting jurors in order to reach certain verdicts or sentences. An individual juror no longer exposed to the dynamic offered by jury deliberations often may question his vote once the jury has been dismissed. Such self-doubt would be expected once extrinsic influences bear down on the former jurors, especially in decisions of life and death.

J.A. 105-106. Because of that complex dynamic, reliance on post-verdict affidavits may decrease, rather than increase, the reliability of the capital sentencing process.

2. Although petitioner does not dispute that he did not object to the instructions he now attacks, he mistakenly maintains (Br. 19 & nn.13 & 14, 26-28 & n.22) that he is nonetheless free from the constraints of plain error review.

When a party forfeits a claim, however, the plain error rule limits an appellate court's power to grant relief. *Olano*, 507 U.S. at 731. That principle applies to petitioner's claim of instructional error because he failed to object to the instructions before the jury retired to consider its verdict on the sentence. See *Johnson*, 520 U.S. at 465; Fed. R. Crim. P. 30.

Petitioner argues (Br. 19 n.14) that he did not forfeit the claim that the jury instructions actually given were erroneous because he requested a separate instruction that the jury's failure to agree on the sentence would result in a court-imposed sentence of life imprisonment without release. The denial of the requested instruction is preserved as an independent claim (which he now asserts before this Court, see Part II, *infra*). But it cannot do service for a timely objection to other instructions actually given. See 2 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 484, at 702 (2d ed. 1982) ("A party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given."); *e.g.*, *United States* v. *Wong*, 40 F.3d 1347, 1373 (2d Cir. 1994) ("we have made it clear that a defendant's requested instructions do not substitute for specific objections to the court's instructions") (quotation marks omitted), cert. denied, 514 U.S. 1113 (1995).

After petitioner's requested jury instruction was denied, he could have made a separate objection to the instructions that remained, explaining to the court his theory that they would have misled the jury about the effect of deadlock. He did not do so. A party is required, however, to object to "any portion of the charge or omission therefrom * * * stating distinctly the matter to which that party objects and the grounds of the objection." Fed. R. Crim. P. 30. By remaining silent about the alleged misleading instructions before the jury retired to deliberate, petitioner deprived the district court of an opportunity to cure the supposed ambiguity.

Petitioner admits that he was aware of the alleged flaws in the jury instructions but chose not to object to them (Br. 7, 9). Indeed, petitioner contributed to any error that did exist in the instructions: petitioner requested instructions and verdict forms that presented a lesser-sentence option to the jury, both in his preliminary requests (3 R. 616-619, 625-626, 650-654) and in his final requests (6 R. 1144, 1151). Petitioner continued to advance the lesser-sentence option in his written and oral objections to the court's charge. See J.A. 18, 25-26, 107 n.10.

If a request for one instruction could substitute for an objection to a different instruction, litigants could reap the benefit of potentially erroneous instructions without also accepting the risks of those instructions. The instructions to which petitioner declined to object gave the jury the third option of recommending a sentence less severe than life without release, an option that offered a possible strategic benefit to petitioner. Although petitioner contends (Br. 17-18, 19 n.13) (and we do not dispute), that the third option was not available for the murder petitioner committed, see note 2, *supra*, the court of appeals explained that, at the time petitioner was sentenced, "no clearly established law answered the question of whether § 3593 [which provides for a lesser sentence option] or the substantive criminal statute under which the defendant is convicted [18 U.S.C. 1201, which does not authorize a lesser-sentence option,] provides the correct sentencing options." J.A. 110-111. If in fact the jury had chosen the lesser-sentence option, petitioner could have argued that the option was available on the theory that the sentencing provisions of the FDPA take precedence over the provisions of 18 U.S.C. 1201.

For the same reason, the fact that petitioner raised the claim that the jury instructions were misleading in a motion for a new trial and a motion to reconsider the denial of that motion does not excuse his failure to raise the issue before the jury retired to consider its verdict on the sentence. See

Fed. R. Crim. P. 30. Failure to raise a potential problem in jury instructions until after the jury has rendered a verdict frustrates the interests in judicial economy and fair play that underlie the objection requirement. Petitioner is not assisted by his reliance (Br. 19 n.14) on *Leary* v. *United States*, 395 U.S. 6 (1969). In that case, the defendant raised the alleged error in a motion for directed verdict, before the jury retired to consider its verdict. *Id.* at 32.

Petitioner also contends (Br. 19 n.14, 26-28 & n.22) that plain error review is inapplicable because the alleged instructional error was an "arbitrary factor" under 18 U.S.C. 3595(c)(2)(A), and reversal for arbitrary factors is required even absent an objection.[6] Section 3595(c)(2)(A) provides that a reviewing court shall remand for resentencing if it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." The phrase "arbitrary factor" "gathers meaning from the words around it." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In context, an "arbitrary factor" is an irrelevant consideration akin to passion or prejudice, not a misunderstanding of the jury instructions. That meaning is confirmed by examination of the origin of the phrase. As petitioner notes (Br. 26), the concept of review for "passion, prejudice, or any other arbitrary factor" was drawn from the Court's opinions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), which approved a similar review mandated by the Georgia death penalty statute. The *Gregg* Court described that review as a check to ensure that similar cases were treated similarly, not an examination for ordinary error. See 428 U.S. at 204-205

[6] Petitioner did not raise that statutory claim in his petition for certiorari, and it is therefore not properly before this Court. See note 5, *supra*.

(opinion of Stewart, Powell, & Stevens, JJ.); *id.* at 223-224 (opinion of White & Rehnquist, JJ., & Burger, C.J.).[7]

Section 3595(c)(1) governs the court of appeals' disposition of a death-sentence appeal. In separate clauses, it requires consideration of "all substantive and procedural issues raised on the appeal of a sentence of death," and "the influence of passion, prejudice, or any other arbitrary factor." The statute also provides for reversal based on "legal error" (Section 3595(c)(2)(C)) or "the influence of passion, prejudice, or any other arbitrary factor" (Section 3595(c)(2)(A)). Petitioner's attempt to recast an ordinary legal error in the instructions as an arbitrary factor is inconsistent with the distinction drawn in the statute. Further, if petitioner were correct that "arbitrariness" can sweep in generic claims of legal error in the sentencing proceeding and that it requires reversal without regard to the plain error rule, it would vitiate the requirement of timely objection to preserve legal error, which Congress clearly intended to apply under the FDPA. See 18 U.S.C. 3595(c)(2)(C) (authorizing reversal for "any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure").[8]

[7] Petitioner argues (Br. 26-28 & n.22) that "arbitrary factor" as used in Section 3595(c)(2)(A) should be construed to include instructional errors because Congress must be presumed to have adopted the interpretations given that term by courts in other jurisdictions that modeled their statutes after the Georgia statute upheld in *Gregg*. There is no such presumption. Although the interpretation that the courts of *Georgia* had accorded the phrase might be relevant to its meaning as it is used in Section 3595, see *Carolene Prods. Co.* v. *United States*, 323 U.S. 18, 26 (1944); but see *Shannon*, 512 U.S. at 581-582, the interpretation by courts of other jurisdictions is not. Petitioner has not cited any Georgia law holding that an instructional error is an arbitrary factor.

[8] Even if petitioner were correct that an instructional error may be an arbitrary factor, an objection would still be required to preserve the error for appeal. Fed. R. Crim. P. 52(b). Petitioner incorrectly argues (Br. 27 n. 22) that Congress must be presumed to have adopted Georgia's procedural

II. PETITIONER WAS NOT ENTITLED TO AN INSTRUCTION THAT THE COURT WOULD IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT RELEASE IF THE JURY COULD NOT UNANIMOUSLY AGREE ON A SENTENCING RECOMMENDATION

The court of appeals correctly upheld the district court's refusal to instruct the jury that its failure to agree on a unanimous sentencing recommendation would result in a court-imposed sentence of life without release. Petitioner's claimed entitlement to that instruction requires him to show both that: (1) the FDPA mandates that the court impose sentence if the jury deadlocks; and (2) jurors must be instructed when they begin deliberations on what will happen if those deliberations ultimately fail to achieve unanimity. Each premise is incorrect.

A. The FDPA Permits A New Capital Sentencing Hearing If The Jury Fails To Return A Unanimous Sentencing Recommendation

Petitioner's proposed instructions (J.A. 13-15) incorrectly state the law, because, if a jury fails to make a unanimous sentencing recommendation, the government may seek a new capital sentencing hearing. "It has been established for [175] years, since the opinion of Justice Story in *United States* v. *Perez*, [22 U.S. (9 Wheat.) 579] (1824), that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of

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rule that review for passion, prejudice, or any other arbitrary factor must be conducted even when the defendant has not objected. That is particularly true because, under the Georgia statute, appellate review for arbitrary factors was mandatory, see Ga. Code Ann. § 27-2537(c) (Harrison 1978); *Gregg*, 428 U.S. at 204, but, under the federal statute, appellate review occurs only "upon appeal by the defendant." 18 U.S.C. 3595(a).

public justice would otherwise be defeated.'" *Richardson* v. *United States*, 468 U.S. 317, 323-324 (1984) (citation omitted). "The Government, like the defendant, is entitled to resolution of the case by verdict from the jury." *Id.* at 326. Thus, although no federal statute or procedural rule expressly allows retrial following a hung jury on a substantive criminal charge, it has long been the rule that the government is entitled to retry a case if the jury cannot reach a unanimous verdict.

The FDPA accommodates that background rule. Section 3593(b)(1) provides that the penalty phase hearing ordinarily should be conducted "before the jury that determined the defendant's guilt," but Section 3593(b)(2) permits the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause." The phrase "discharged for good cause" encompasses the discharge of the guilt-phase jury because it has been unable to agree on a unanimous sentencing decision. Cf. *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978) ("mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict" has "long [been] considered the classic basis for a proper mistrial").

Moreover, the FDPA requires jury unanimity for any sentencing recommendation. See 18 U.S.C. 3593(e) ("jury by unanimous vote * * * shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or [to] some other lesser sentence"). By the specific terms of the statute, therefore, there can be no jury sentencing recommendation without unanimous agreement. The legal theory underlying petitioner's proposed instructions—that "Unanimity [is] Required Only for [a] Death Sentence [Recommendation]" (J.A. 14)—thus contravenes the plain statutory language. The proposed instructions themselves embodied the same error. J.A. 13 (requested instruction that if "any" juror "is not persuaded

that justice demands Mr. Jones's execution, then the jury must * * * fix Mr. Jones' punishment at life in prison without any possibility of release."); J.A. 14 (requested instruction that if "even a single juror" is "not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death.").

Contrary to petitioner's argument (Br. 34-35), his interpretation is not compelled by the second sentence of 18 U.S.C. 3594. That Section provides:

> Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. *Otherwise, the court shall impose any lesser sentence that is authorized by law.* Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. 3594 (emphasis added). Read in the context of the preceding sentence and the statute as a whole, the italicized sentence means that, if the jury, in accordance with Section 3593(e), unanimously recommends "some other lesser sentence," 18 U.S.C. 3593(e), rather than death or life in prison, the court shall impose "any lesser sentence that is authorized by law," 18 U.S.C. 3594.[9] In other words, if the jury unanimously recommends death or life in prison, the judge must impose the recommended sentence. If the jury unanimously recommends less severe punishment, the court, not the jury, fixes the actual term of imprisonment.

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[9] The "notwithstanding" sentence that follows empowers the judge to impose a sentence of life without release (rather than a "lesser sentence") if the substantive criminal statute carries a maximum imprisonment term of life.

Petitioner contends (Br. 34) that the italicized sentence serves an additional purpose, beyond providing that the court (rather than the jury) shall fix the actual term of imprisonment in cases when the jury recommends punishment less severe than life in prison. In his view, the sentence also means that jury deadlock on the more severe sentencing options requires the court to impose the least severe punishment option. Petitioner's reading of the sentence is incorrect, not simply because it overlooks the background rule that retrial is generally permitted following a hung jury, but more importantly because it fails to take account of the remainder of the statute. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569-570 (1995) (statute must be read as a whole).

Petitioner's default sentencing rule would nullify the jury-unanimity requirement in Section 3593(e), which applies to all sentencing recommendations under the statute, including imprisonment for a term of years less than life. Petitioner's rule also runs counter to Section 3593(b)(2)(C), which allows sentencing by a specially impaneled jury when "the jury that determined the defendant's guilt was discharged for good cause." See generally *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (court should not read statute in a way that would "emasculate an entire section"); *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 698 (1995) (noting "reluctance to treat statutory terms as surplusage").[10]

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[10] The sentence in H.R. Rep. No. 467, 103d Cong., 2d Sess. 9 (1994), on which petitioner relies (Br. 34-35), does not purport to interpret the second sentence of 18 U.S.C. 3594 and is included in the explanatory material not for that Section but for 18 U.S.C. 3593. The Court should not rely on that remark to defeat the understanding of the statute that is clear from the language of the statute as a whole, construed in light of the background rule permitting retrial after hung juries. Cf. *Shannon*, 512 U.S. at 583 ("To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process.").

In notable contrast to the FDPA, the provisions of many capital punishment statutes in States using juries to decide or recommend the appropriate punishment reflect petitioner's proposed default procedure in the event of jury deadlock. Most capital punishment States that use a binding jury sentencing procedure provide in simple and direct language that jury deadlock as to the appropriate sentence results in a court-imposed sentence. See App. A, *infra*. A few other state statutes also suggest that result in far clearer terms than those on which petitioner relies here, because those statutes establish a life or other prison term as the presumptive sentence absent unanimous jury findings and a death sentence recommendation. See App. B, *infra*. California's death penalty statute expressly provides for a new capital sentencing hearing in the event the first jury deadlocks in its findings or recommendation. Cal. Penal Code § 190.4(a) and (b) (West 1988). In Kentucky, where the statute is silent, the failure of a jury to reach a unanimous verdict on the sentence results in a new sentencing hearing. See *Skaggs* v. *Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985), cert. denied, 476 U.S. 1130 (1986). In Connecticut, the trial judge has discretion to order a new sentencing hearing. See *State* v. *Breton*, 663 A.2d 1026, 1043, 1049-1050 n.40 (Conn. 1995).[11]

Congress could have used language as simple and direct as that used in state statutes had it meant to preclude a second sentencing hearing and to return the matter to the court to impose a non-death sentence if the jury deadlocks. Instead, Congress expressly required that a jury decide "by unanimous vote" before it could recommend either death, life without release, or a lesser sentence, 18 U.S.C. 3593(e), and permitted the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause," 18 U.S.C. 3593(b)(2). Coupled with the background rule that the prosecution may seek a new trial following a hung jury even absent express statutory authority, those provisions refute petitioner's proposed reading of the statute to preclude by implication a new sentencing hearing if the first jury hangs.

[11] States employing juries in a purely advisory capacity either allow non-unanimous recommendations, see Del. Code Ann., tit. 11, § 4209(c)(3)(b) and (c)(4) (1995); Fla. Stat. Ann. § 921.141(2) and (3) (West 1985 & Supp. 1996), leave the matter entirely to the court in the event of deadlock, see Ind. Code Ann. § 35-50-2-9(f) (Michie 1994 & Supp. 1998), or expressly allow a new jury to be empaneled, see Ala. Code § 13A-5-46(g) (1994).

B. The Jury Need Not Be Instructed On The Consequences Of A Breakdown In Its Deliberations

Even if the court is required to impose a sentence other than death if the jury hangs, petitioner has no right to an instruction informing the jury of that requirement. Nothing in the Constitution or federal law mandates that jurors be told of the consequences of their failure to achieve unanimity. To the contrary, such an instruction would undermine the strong societal interest in obtaining a unanimous recommendation in a capital case, in order for the jury to serve as the conscience of the community in deciding whether the defendant should live or die. See *Lowenfield*, 484 U.S. at 237-238 (citing *Allen*, 164 U.S. at 501-502, and *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968)).

1. Petitioner does not have a statutory right to an instruction on deadlock. When Congress wishes to require a jury instruction, in capital and non-capital cases alike, it plainly knows how to do so. See, *e.g.*, 21 U.S.C. 848(k) (jury "is never required to impose a death sentence and the jury shall be so instructed"); 18 U.S.C. 3501(a) (trial court "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances"). In this very statute, Congress expressly required the jury to be instructed not to consider race, color, religious beliefs, na-

tional origin, or sex in determining the appropriate sentence, see 18 U.S.C. 3593(f), but Congress nowhere even hinted that the jury should be instructed on the consequences of deadlock. Cf. *Shannon*, 512 U.S. at 580 ("The Act's text * * * gives no support to Shannon's contention that an instruction informing the jury of the consequences of an [not-guilty-by-reason-of-insanity] verdict is required.").

Petitioner mistakenly asserts (Br. 36-37) that an instruction is required by the statutory provision that, if the defendant appeals his sentence, the court of appeals shall remand for resentencing if it finds that the sentence was imposed based on "passion, prejudice, or any other arbitrary factor." See 18 U.S.C. 3595(c)(2). That language, which speaks only to appellate review upon the election of the defendant, cannot support the construction petitioner would put on it. Indeed, petitioner cites no case so interpreting that or similar language. The few courts that have required an instruction of the type petitioner seeks have done so either under their supervisory authority, see *State* v. *Ramseur*, 524 A.2d 188, 284 (N.J. 1987), or under the mistaken belief that an instruction is required by the Eighth Amendment, see *State* v. *Williams*, 392 So. 2d 619, 634-635 (La. 1980); *Whalen* v. *State*, 492 A.2d 552, 562 (Del. 1985).

2. Nor is there any basis for requiring the instruction that petitioner seeks as an exercise of supervisory power. Congress has crafted a comprehensive set of procedures to govern imposition of the death penalty and has declined to mandate an instruction on deadlock. "Under these circumstances, [the Court is] reluctant to depart from well-established principles of criminal practice without more explicit guidance from Congress." *Shannon*, 512 U.S. at 587 (rejecting use of supervisory authority).

In most capital punishment States that have addressed the issue, statutory or decisional law precludes or discourages informing jurors that the result of their failure to achieve unanimity will be a court-imposed sentence. See,

e.g., Tenn. Code Ann. § 39-13-204(h) (1997 & Supp. 1998) ("The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment."); Tex. Crim. P. Code Ann., art. 37.071.2(a) (West Supp. 1999) (similar); *State* v. *McCarver*, 462 S.E.2d 25, 42 (N.C. 1995), cert. denied, 517 U.S. 1110 (1996); *Oken* v. *State*, 612 A.2d 258, 265 (Md. 1992), cert. denied, 507 U.S. 931 (1993); *People* v. *Kimble*, 749 P.2d 803, 825-826 (Cal.) (decided under prior version of statute requiring court-imposed sentence in event of deadlock), cert. denied, 488 U.S. 871 (1988); *Brogie* v. *State*, 695 P.2d 538, 547 (Okla. Crim. App. 1985); *Coulter* v. *State*, 438 So. 2d 336, 346 (Ala. Crim. App. 1982), aff'd, 438 So.2d 352 (Ala. 1983); *State* v. *Adams*, 283 S.E.2d 582, 587 (S.C. 1981), cert. denied, 464 U.S. 1023 (1983); *Justus* v. *Commonwealth*, 266 S.E.2d 87, 92 (Va. 1980), cert. denied, 455 U.S. 983 (1982). Contra *Ramseur*, *supra*; *Whalen*, *supra*; *Williams*, *supra*; Mo. Ann. Stat. § 565.030.4 (West 1979); cf. Or. Rev. Stat. § 163.150(2)(a) (1990 & Supp. 1998) (quoted at p. 5a, *infra*).

State cases rejecting such instructions have explained that they involve a "procedural matter" addressed to the court and not to the jury. *E.g.*, *Justus*, 266 S.E.2d at 92. Courts have also recognized that the instructions would be "an open invitation for the jury to avoid its responsibility and to disagree." *Ibid.* As a result, the instructions would frustrate the strong interest in jury unanimity, which is a bedrock principle of our jury system.

3. The Constitution does not override considered legislative and judicial judgments that instructions such as those proposed by petitioner here would not further, but would undermine, the goal of meaningful jury deliberations in capital sentencing cases. Every federal court of appeals considering the matter has rejected the argument that the Constitution requires a jury instruction on the consequences of jury deadlock. See, *e.g.*, *Coe* v. *Bell*, 161 F.3d 320, 339-340

(6th Cir. 1998); *United States* v. *Chandler*, 996 F.2d 1073, 1088-1089 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994); *Zettlemoyer* v. *Fulcomer*, 923 F.2d 284, 309 (3d Cir.), cert. denied, 502 U.S. 902 (1991); *Evans* v. *Thompson*, 881 F.2d 117, 123-124 (4th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

The Eighth Amendment to the Constitution imposes two broad limitations on capital sentencing schemes: (1) either the guilt determination or the sentencing process "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Lowenfield*, 484 U.S. at 244 (quotation marks and citation omitted); and (2) the sentencing decision must rest on an "individualized inquiry" under which "the character and record of the individual offender and the circumstances of the particular offense" are considered, *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987). See *Romano*, 512 U.S. at 6-7. To prevent arbitrariness, the Constitution precludes some instructions that "improperly describe[ ] the role assigned to the jury by local law" and thus mislead the jury "in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Id.* at 9. Due process may also require instructions or other information on the consequences of a particular sentence, if necessary to prevent a prosecution argument in favor of the death penalty from creating a false or misleading impression. See *Simmons* v. *South Carolina*, 512 U.S. 154 (1994) (because prosecution relied on defendant's future dangerousness to support death penalty, defendant was entitled to instruction or other information that life sentence carried no possibility of parole).

This Court has never suggested, however, that the Constitution requires that the jury be instructed on the effects of a breakdown in the deliberative process that precludes jury unanimity. To the contrary, the Court has held that,

even in a jurisdiction in which jury deadlock returns the matter to the judge for sentencing, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Lowenfield*, 484 U.S. at 238 (quoting *Witherspoon*, 391 U.S. at 519). The Court in *Lowenfield* thus approved the giving of an *Allen* charge to a capital sentencing jury that initially reported an inability to agree on the appropriate sentence. It approvingly quoted the *Allen* Court's observation that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." 484 U.S. at 237 (quoting *Allen*, 164 U.S. at 501). The Court explained that the interest in encouraging full deliberations aimed at achieving jury unanimity exists "even in capital cases such as this one and *Allen*." *Id.* at 238. Although *Lowenfield* differed from *Allen* because a jury sentencing deadlock under the Louisiana statute precluded a death penalty retrial, and deadlock at the guilt phase in *Allen* would have required a new jury trial, the Court did not find that distinction "dispositive." *Ibid.*

Lowenfield illustrates that, as long as a capital sentencing system meaningfully narrows the class of death-eligible defendants and allows individualized consideration of all relevant mitigating circumstances, this Court will defer to legislative and judicial judgments regarding what information should be presented to a capital sentencing jury. See also *Romano*, 512 U.S. at 7 ("Within these constitutional limits, 'the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.'") (citation omitted); *Buchanan* v. *Angelone*, 118 S. Ct. 757, 761 (1998) (recognizing discretion to tailor instructions in selection phase of capital case as long as "restrictions on the jury's sentencing determination [do] not preclude the jury from being able to give effect to mitigating evidence"); *Simmons*, 512 U.S. at 168 (plurality opinion of Blackmun, J.)

(acknowledging "the broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing"); *California* v. *Ramos*, 463 U.S. 992, 1013 (1983) (deferring to state judgment permitting jury to be informed of governor's power to commute life sentence because such an instruction "does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation").

Petitioner's claim in this case has even less foundation than those this Court has rejected, because his proposed instruction had nothing to do with mitigation (as in *Buchanan*) or sentencing consequences (as in *Ramos*). The instructions given by the district court in this case fully apprised the jurors of their obligation to consider mitigating circumstances and of the legal effect of their recommendation. The Constitution does not require that jurors be given additional, purely procedural, information about what will happen if their internal deliberations break down.[12]

III. THE SUBMISSION TO THE JURY OF ALLEGEDLY DUPLICATIVE AND VAGUE AGGRAVATING FACTORS DOES NOT ENTITLE PETITIONER TO RELIEF

As petitioner acknowledges (Br. 41), Congress has expressly provided that federal death sentences are not to be

[12] Petitioner argues (Br. 38-39 n.30) that the absence of an instruction explaining the result of jury deadlock forced the jury into an impermissible "all or nothing" choice (as in *Beck* v. *Alabama*, 447 U.S. 627 (1980)), and gave the jury "materially false" information (as in *Townsend* v. *Burke*, 334 U.S. 736 (1948)). Neither proposition is sound. *Beck* applies only to an improper "all or nothing" choice between innocence and a capital conviction, see *Schad* v. *Arizona*, 501 U.S. 624, 647 (1991), which was not the case here. The jury's possible sentencing verdicts were laid before it and jurors were not forced into an "all or nothing" verdict by lack of information about the consequences of deadlock. Nor was there was any misleading instruction on the topic of deadlock.

set aside based on errors that are found to be harmless beyond a reasonable doubt. 18 U.S.C. 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless"); see also Fed. R. Crim. P. 52(a). This Court has recognized that such harmless error review is permitted by the Constitution. See *Clemons* v. *Mississippi*, 494 U.S. 738, 752-754 (1990). A reviewing court may affirm a death sentence, despite the jury's weighing of vague or otherwise improper aggravating factors if the court determines beyond a reasonable doubt that the sentence would have been the same either if the factor had never been submitted or if the factor had been "properly defined in the jury instructions." *Id.* at 753-754.

Petitioner contends (Br. 39-49) that the court of appeals improperly conducted harmless-error analysis after finding invalid aggravating factors and that the record cannot support a harmless-error finding. In fact, there was no error in the non-statutory aggravating factors that the district court submitted to the jury. Those factors—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the offense on her family"—were neither vague, duplicative, nor overbroad.[13] If any such flaw did exist, however, it is beyond a reasonable doubt that petitioner's sentence would have been the same even if those two non-statutory aggravating factors had been more precisely defined or had never been submitted to the jury.

[13] As the prevailing party in the court of appeals, the United States is entitled to defend the judgment on any ground properly raised in the court of appeals. See, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). In that court, the government argued that the non-statutory factors are valid. Gov't C.A. Br. 77-87.

A. The Non-Statutory Aggravating Factors Were Constitutionally Valid

1. Aggravating factors may have two roles in a capital sentencing system. First, an aggravating factor may be used to narrow the class of defendants who are eligible for the death penalty. *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983). Second, an aggravating factor may be considered by the sentencer in the selection decision, *i.e.*, the determination whether a defendant who is eligible for the death penalty will in fact be sentenced to death. *Id.* at 878-879. An unduly vague aggravating factor violates the Eighth Amendment because it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Maynard* v. *Cartwright*, 486 U.S. 356, 361-362 (1988); *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994) (the "controlling objective" in vagueness analysis is the need to "ensure that the [capital sentencing] process is neutral and principled so as to guard against bias or caprice in the sentencing decision").

A sentencing "factor is not unconstitutional if it has some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" *Tuilaepa*, 512 U.S. at 973 (quoting *Jurek* v. *Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in the judgment)). The Court has invalidated as unduly vague "only a few factors," which are "quite similar" to each other. *Id.* at 974. See, *e.g.*, *Maynard*, 486 U.S. at 363-364 (whether murder was "heinous, atrocious, or cruel"); *Godfrey* v. *Georgia*, 446 U.S. 420, 427-429 (1980) (whether murder was "outrageously or wantonly vile, horrible and inhuman"). In contrast, the Court has upheld many other factors against vagueness challenges, in recognition of the authority of legislatures to "rely upon the jury, in its sound judgment, to exercise wide discretion." *Tuilaepa*, 512 U.S.

at 974 (collecting cases). "Because the proper degree of definition of eligibility and selection factors often is not susceptible of mathematical precision, our vagueness review is quite deferential." *Id.* at 973 (quotation marks and citation omitted).

2. The non-statutory factors in this case are consistent with the requirements of the Constitution. Factor 3(B) asked the jury to consider as an aggravating factor the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas." J.A. 53. Those considerations focused on the special vulnerability of the victim. Factor 3(C) asked the jury to consider as an aggravating factor the victim's "personal characteristics and the effect of the instant offense on [her] family." *Ibid.* Those considerations focused on the uniqueness of the victim and the specific harm caused to the victim's family. The jury's consideration of both of those subjects is authorized by the FDPA. See 18 U.S.C. 3593(c) (allowing presentation at sentencing of information "as to any matter relevant to the sentence"); 18 U.S.C. 3593(d) (allowing jury to consider not only statutory aggravating factors but also "any other aggravating factor for which notice has been provided" by the prosecution). The FDPA treats other reasons for victim vulnerability as a statutory aggravating factor. 18 U.S.C. 3592(c)(11) ("victim was particularly vulnerable due to old age, youth, or infirmity"). And the statute expressly authorizes victim impact as an aggravating factor. 18 U.S.C. 3593(a) (non-statutory factors "may include factors concerning the effect of the offense on the victim and the victim's family"). The jury's consideration of those factors is entirely proper under the Constitution. See *Payne* v. *Tennessee*, 501 U.S. 808, 817, 827 (1991) (allowing capital sentencing jury to hear and consider evidence of the "personal characteristics of the victim and the emotional impact of the crimes on the victim's family").

Although the court of appeals recognized that capital sentencing juries properly may consider "vulnerability and victim impact evidence," it held that "the language used in 3(B) and 3(C) does not accomplish this goal." J.A. 117-118. The court believed the factors as drafted were invalid because they were "duplicative" and "vague and overbroad." J.A. 118-119. They were duplicative, according to the court, because the "plain meaning of the term 'personal characteristics,' used in 3(C), necessarily includes 'young age, slight stature, background, and unfamiliarity,' which the jury was asked to consider in 3(B)." J.A. 118. They were vague and overbroad, according to the court, because they "fail[ed] to guide the jury's discretion, or distinguish this murder from any other murder" and were not accompanied by any "further definition or instruction" necessary to limit "the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*." J.A. 118-119 (quoting *Maynard* v. *Cartwright*, 486 U.S. at 361-362). Those conclusions are incorrect.

Duplication. The factors in this case were not duplicative. A jury that found both of those factors would reasonably understand that the specific victim characteristics listed in Factor 3(B) (the victim's youth, small size, background, and newness to the area) were those that made her a vulnerable victim, while the reference to her "personal characteristics" in Factor 3(C) was intended to capture separately her uniqueness as an individual human being. The latter reference accords with this Court's use in *Payne* of the phrase "personal characteristics" to denote the victim's "uniqueness as an individual human being," which a jury may consider to understand the "specific harm caused by the crime in question." 501 U.S. at 817, 823, 825. There is no reason to think that the jury would have understood the reference to "personal characteristics" differently, particularly since Factor 3(C) went on to refer to the impact of the crime on the victim's family and thus made clear that it covered the effects of the crime.

Vagueness. Eighth Amendment "vagueness review is quite deferential" and is satisfied if the factors have "some common-sense core of meaning." *Tuilaepa*, 512 U.S. at 973 (quotation marks and citation omitted). Under that standard, the factors at issue are not vague. The jury would have had no difficulty understanding the meaning of the references to McBride's "young age," "slight stature," "background," and "unfamiliarity with San Angelo, Texas." Those characteristics were "phrased in conventional and understandable terms." *Tuilaepa*, 512 U.S. at 975-976 (factors including "circumstances of the crime," "presence or absence of criminal activity by the defendant," and "age of the defendant" not vague). The jury had a particularly concrete understanding of McBride's characteristics as described in the aggravating factor, because, without objection, the jury had heard testimony during the guilt phase that McBride was only 19 years old; was tiny—5 feet 2 inches tall, weighing only 105 pounds, with a 20 or 22 inch waist; had entered the Army after only spending six months in college; had been in the Army only one year; and had been transferred to San Angelo only eight days before her murder. See 16 R. 804-808. The jury also heard evidence of how petitioner used his size and strength to overpower her; ambush a would-be rescuer and beat him into unconsciousness; confine her in a closet after sexually abusing her; force her to accompany him on a drive some 20 miles out of town while searching for a place to murder her and dispose of her body; and then strike her with a tire iron to take her life. See pp. 1-3, *supra*. McBride's diminutive size and unfamiliarity with her surroundings doubtless heightened her terror and feelings of vulnerability while petitioner held her captive and drove her to the scene of her murder.

The jury also would have had no difficulty understanding the meaning of McBride's "personal characteristics and the effect of the offense on her family." As noted above, this Court itself has used those phrases to describe permissible

evidence that the capital sentencer may properly consider. *Payne*, 501 U.S. at 817, 827. In light of the evidence presented to it, the jury could readily form a judgment on the degree of specific harm caused by petitioner's crime and determine how much weight to accord to that harm in its deliberations on whether to recommend a capital sentence.

It is not constitutionally problematic that the jury was not given specific guidance about how to ascertain and weigh the factors. Although death-eligibility aggravating factors "must require an answer to a factual question" to perform their narrowing function, selection-stage factors need not conform to such a rigid model in order to satisfy Eighth Amendment vagueness standards. *Tuilaepa*, 512 U.S. at 978. In the FDPA, non-statutory factors are not needed to fulfill the narrowing function required by the Eighth Amendment; that function is instead fulfilled by the requirement that the jury must find at least one statutory aggravating factor. 18 U.S.C. 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law."). The non-statutory factors then form part of the weighing of aggravating against mitigating factors in the selection stage. 18 U.S.C. 3593(e). In the selection stage, a capital jury may be directed to a general subject matter, *Tuilaepa*, 512 U.S. at 978, and "need not be instructed how to weigh any particular fact in the capital sentencing decision." *Id.* at 979. The factors here provided more specific direction to the jury than that, because each referred to a specific factual area and required that the jury find that it aggravated the crime before the factor could be weighed.

Overbreadth. The factors also are not overbroad. The court of appeals suggested that the factors at issue fail to "distinguish this murder from any other murder." J.A. 118. Unconstitutional overbreadth in this setting, however, means only that the "sentencer fairly could conclude that an aggravating [factor] applies to *every* defendant eligible for

the death penalty." *Arave* v. *Creech*, 507 U.S. 463, 473-474 (1993) (giving as examples the undefined adjectives "heinous," "vile," etc. in *Maynard*, *supra*, and *Godfrey*, *supra*). It is true that all murders have victims and all killings cause pain to survivors. But it is hardly accurate to say that, in each and every murder, the victim's age, size, and background, contributed to her vulnerability in a way that exacerbated the character of the killing, as in this case. Nor is it accurate to say that, because each murder extinguishes a particular life and causes pain to surviving friends and family, juries are barred from considering the loss of the unique individual who was killed and the particular suffering experienced by her family. These factors are inherently individualized in every case.

B. Any Error In The Submission Of The Non-Statutory Aggravating Factors Was Harmless Beyond A Reasonable Doubt

Alternatively, assuming error in the non-statutory factors, any such error was harmless beyond a reasonable doubt. The Court has stated that "[a] vague aggravating factor used in the weighing process * * * creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer* v. *Black*, 503 U.S. 222, 235 (1992). But the Court has also ruled that such an error is subject to harmless-error analysis. See *id.* at 237; *Clemons*, 494 U.S. at 752-754. In this case, the error is harmless under an approach that asks either (1) whether the jury would have imposed a death sentence if the invalid factors were defined properly, or (2) whether the jury would have imposed a death sentence in the absence of the invalid factors.

1. A reviewing court may find harmless error if it determines "beyond reasonable doubt the result would have been the same had the [invalid] aggravating circumstance been

properly defined in the jury instructions." See *Clemons*, 494 U.S. at 754. In this case, with minor changes, the factors at issue could have been drawn more precisely to set forth specific propositions for the jury. For example, Factor 3(B) could have been written to allege that "Tracie Joy McBride [was a particularly vulnerable victim because of her] young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and Factor 3(C) could have alleged that "[The murder caused exceptional harm because of] Tracie Joy McBride's personal characteristics and the effect of the instant offense on [her] family."

If the court had reformulated the instructions in that manner, it might have facilitated the jury's deliberations, but there can be no real doubt that the result would have been the same. A jury that gave dispositive sentencing weight to McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," no doubt would have reached the same conclusion had it been required to find that McBride was particularly vulnerable for those reasons. Likewise, a jury that gave dispositive sentencing weight to McBride's "personal characteristics and the effect of the offense on her family" would have reached the same conclusion had it been required to find that McBride's murder caused exceptional harm for those reasons. The government's closing arguments on the factors, while brief, conveyed to the jury McBride's vulnerability, her uniqueness as a person, and the loss suffered by her family.[14] And petitioner does not claim that the factors brought inadmissible evidence before the jury or were improperly inflammatory.[15]

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[14] We have reproduced in Appendix C, *infra*, the government's references to the factors in its argument at sentencing.

[15] Any vagueness problem with the factors would not have caused the jury to recommend the death sentence based an "illusory circumstance," *Stringer*, 503 U.S. at 235, because the factors pointed (even if imperfectly) to relevant, permissible considerations that were given concreteness by

Likewise, the purported duplication between the factors was harmless beyond a reasonable doubt. The error (if any) consisted in the improper double counting of McBride's personal characteristics. That error could not have infected the jury's sentencing decision because the district court specifically instructed the jury that the weighing process "is not a mechanical" one and that the jury "should not simply count the number of aggravating and mitigating factors and reach a decision on which number is greater" but "should consider the weight and value of each factor." J.A. 45. The jury must be presumed to have followed that instruction. See *Shannon*, 512 U.S. at 585; *Richardson* v. *Marsh*, 481 U.S. at 206. Indeed, reviewing courts have relied on similar instructions in determining that the submission of duplicative factors was harmless in particular cases. See *United States* v. *Tipton*, 90 F.3d 861, 900-901 (4th Cir. 1996) (duplicative intent factors), cert. denied, 117 S. Ct. 2414 (1997); *Chandler*, 996 F.2d at 1093 (aggravating factor duplicative of finding at guilt phase). In any event, any double reference to McBride's personal characteristics did not increase the number of aggravating factors, for Factor 3(C) also referred to the separate subject of the effect on the victim's family.

2. The same harmless-error finding results from considering whether the jury would have reached the same verdict in the absence of the aggravating factors. *Clemons*, 494 U.S. at 753. Neither non-statutory factor was a significant part of

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the evidence and argument at sentencing. See pp. 42-44, *supra*; 19 R. 1526-1539; App. C, *infra*. Nor is there any danger that vagueness allowed bias to infect the sentencing decision, see *Tuilaepa*, 512 U.S. at 973. As required by the statute, 18 U.S.C. 3593(f), each member of the jury certified that "consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decisions, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim would have been." J.A. 59.

the government's sentencing case. Although the government "placed great emphasis on the two statutory aggravating factors found unanimously by the jury" (J.A. 122), it did not dwell on the two non-statutory aggravating factors later held invalid by the court of appeals. At sentencing, the government offered again the evidence from the guilt phase and called 13 additional witnesses (18 R. 1222-1354; 19 R. 1354-1540)— only one of whom (McBride's mother) provided new information relating to the non-statutory aggravating factors at issue here. See 19 R. 1526-1539. None of the government's six rebuttal witnesses provided information relating to those non-statutory aggravating factors. See 23 R. 2346-2463; 24 R. 2464-2698.

The government also made comparatively little mention of the victim-related non-statutory aggravating factors in its argument to the jury at sentencing. Each factor was addressed in a single paragraph of the government's opening that did little more than restate the factor. See 18 R. 1203. The government's closing argument on those factors was also relatively brief. See 25 R. 2733-2734. There was more mention of the factors in rebuttal, but discussion of them did not consume a major part of the argument. See 25 R. 2773, 2775-2776, 2784-2785.

Considering the lack of emphasis on Factors 3(B) and 3(C), the jury must have relied far more heavily on the statutory aggravating factors involving the extremely aggravated circumstances of the crime: petitioner kidnapped McBride without provocation, raped and sodomized her, kept her bound and gagged in his closet while he made sexual advances toward another woman, forced her to clean herself to eliminate signs of the rape, and then brutally murdered her with extreme physical force because he feared she might identify him. See pp. 1-3, *supra*. Contrast *Clemons*, 494 U.S. at 753 (in which "the State repeatedly emphasized and argued the [invalid] factor during the sentencing hearing" but "placed little emphasis on the [valid]

factor"). It is therefore clear, beyond a reasonable doubt, that the jury would have reached the same recommendation even if Factors 3(B) and 3(C) had never been submitted for its consideration.

C. The Court Of Appeals Conducted An Adequate Harmless-Error Inquiry

In affirming petitioner's sentence, the court of appeals elected "to redact the invalid aggravating factors and reconsider the entire mix of aggravating and mitigating circumstances presented to the jury." J.A. 121-122 (quotation marks and citation omitted). On that basis, the court of appeals concluded that "the error was harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." J.A. 122-123. Petitioner argues (Br. 47) that the court of appeals failed to give an adequate explanation of its harmless-error finding. The harmless-error analysis of the court of appeals, however—although not as detailed as might be desired—satisfied the requirements of the Constitution.

This Court's cases make clear that a court of appeals must make "a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer*, 503 U.S. at 230; *Clemons*, 494 U.S. at 753. Contrary to petitioner's contention, however, the Court has not held that the Constitution requires "an articulation of how much weight [the reviewing court] believe[s] the jury assigned to each aggravating and mitigating factor" (Br. 43) or a detailed discussion of "the evidence admitted to establish the invalid aggravating factor, and the nature, quality, and strength of the mitigating evidence" (*id.* at 43 n.33).

The court of appeals carefully reviewed and correctly stated the applicable legal standards for harmless-error review. J.A. 119-121. The court then considered the number and strength of the remaining, valid aggravating factors

(J.A. 122), the mitigating factors (*ibid.*; see also J.A. 86 & n.3), and the prosecutor's argument at sentencing (J.A. 122). The court noted that the jury found two statutory aggravating factors—that petitioner "caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim." *Ibid.* The court also observed that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory factors found unanimously by the jury." *Ibid.* The court might have discussed those considerations in more detail, and might have discussed the evidence presented at the sentencing hearing, but its failure to do so does not render its analysis constitutionally inadequate. Contrast *Clemons*, 494 U.S. at 753 (state supreme court's opinion contained only one sentence stating that error was harmless without any explanation); *Sochor* v. *Florida*, 504 U.S. 527, 539-540 (1992) (state supreme court's opinion did not even mention harmless error).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATE STATUTES EXPLICITLY PROVIDING FOR COURT-IMPOSED SENTENCE IF CAPITAL SENTENCING JURY CANNOT AGREE

1. Ga. Code Ann. § 17-10-31.1(c) (Harrison 1997) ("Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.")

2. Kan. Stat. Ann. § 21-464(e) (1995) ("If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of imprisonment as provided by law.")

3. La. Code Crim. Proc. Ann. art. 905.8 (West 1997) ("If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit or probation, parole or suspension of sentence.")

4. Md. Code Ann., art. 27, § 413(k)(2) (1996) ("If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.")

5. Miss. Code Ann. § 99-19-101(3)(c) (1994) ("If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment."); *id.* § 99-19-103 ("If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.")

6. Mo. Ann. Stat. § 565.030.4 (West 1979 & Supp. 1998) ("If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death.")

7. Nev. Rev. Stat. Ann. § 175.556(1) (Michie 1997) ("In a case in which the death penalty is sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the supreme court shall appoint two district judges * * * who shall with the district judge who conducted the trial * * * conduct the required penalty hearing * * * and give sentence accordingly.")

8. N.H. Rev. Stat. Ann. § 630.5(IX) (1996) ("If the jury cannot agree on the punishment within a reasonable time, the judge shall impose the sentence of life imprisonment without possibility of parole.")

9. N.J. Stat. Ann. § 2C:11-3(c)(3)(c) (West 1995 & Supp. 1998) ("If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b," (which provides for a variety of lesser sentences depending on the circumstances.))

10. N.M. Stat. Ann. § 31-20A-3 (Michie 1994) ("Where * * * the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment.")

11. N.Y. Crim. Pro. Law § 400.27.11(c) (McKinney Supp. 1999) ("In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant" to a non-capital sentence.)

12. N.C. Gen. Stat. § 15A-2000(b) (1997) ("If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.")

13. 21 Okla. Stat. Ann. tit. 21, § 701.11 (West 1983 & Supp. 1999) ("If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.")

14. 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998) ("[T]he court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.")

15. S.C. Code Ann. § 16-3-20 (Supp. 1997) ("If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).")

16. Tenn. Code Ann. § 39-13-204(h) (1997 & Supp. 1998) ("If, after further deliberations [following the jury's inability to agree on death sentence and the trial judge's instruction to consider only non-capital sentences], the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life.")

17. Tex. Crim. P. Code Ann., art. 37.071.2(g) (West Supp. 1999) ("If the jury * * * is unable to answer any issue submitted under Subsection (b) or (e) of this article, the

court shall sentence the defendant to confinement * * * for life.")

18. Utah Code Ann. § 76-3-207(4)(c) (Supp. 1998) ("If the jury is unable to reach a unanimous decision imposing the sentence of death, * * * the jury shall then determine whether the penalty of life in prison without parole shall be imposed. * * * If ten jurors or more do not agree upon a sentence of life in prison without parole, the court shall discharge the jury and impose the sentence of life imprisonment with the possibility of parole.")

19. Va. Code Ann. § 19.2-264.4(E) (Michie 1996) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.")

20. Wyo. Stat. Ann. § 6-2-102(e) (Michie 1997) ("If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.")

APPENDIX B

STATE STATUTES PROVIDING BY IMPLICATION FOR COURT-IMPOSED SENTENCE IF CAPITAL SENTENCING JURY CANNOT AGREE

1. Ark. Code Ann. § 5-4-603(c) (Michie 1997) ("If the jury does not make all findings required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.")

2. 720 Ill. Comp. Stat. Ann. 5/9-1(g) (West 1993 & Supp. 1998) ("Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment * * * .")

3. Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1996) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following" non-capital sentences.)

4. Or. Rev. Stat. § 163.150(2)(a) (1990 & Supp. 1998) ("Upon the conclusion of the presentation of the evidence, the court shall also instruct the jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, [which includes whether the defendant should receive a death sentence,] the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole * * * ."); *id.* § 163.150(1)(c)(B) (1997) ("The court shall instruct the jury to answer the question [whether the defendant should receive a death sentence]

"no" if, * * * one or more of the jurors believe that the defendant should not receive a death sentence.")

5. Wa. Rev. Code Ann. § 10.95.080(2) (West 1990) ("If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4) [*i.e.*, whether jury is convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to warrant a sentence less severe than death], the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1)."); *id.* § 10.95.060(4) (West 1990) ("In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.")

APPENDIX C

REFERENCES BY THE PROSECUTION IN ITS SENTENCING ARGUMENT TO THE NON-STATUTORY AGGRAVATING FACTORS HELD INVALID BY THE COURT OF APPEALS

1. References in Opening Argument:

As to Factor 3(B), the prosecutor stated:

> You can look at such things as Tracie McBride's physical characteristics, her slight stature, 5'1", 100 pounds, her unfamiliarity with the San Angelo area, her training and background in relation to this defendant. Those are things that you can look at in deciding whether this is an aggravating factor you should find beyond a reasonable doubt.

As to Factor 3(C), the prosecutor stated:

> You may look at such things as the impact of the crime on the victim's family, and the characteristics of this particular victim. What made Tracie McBride Tracie McBride. How was she different than other people, what her past was like, what her future was going to be like. Those are things that our law says you can consider. And again, after each of these items, if the government has proved them to you beyond a reasonable doubt and you unanimously agree on that, then you sign your verdict by each of those special aggravating circumstances yes, that you do find those aggravating factors exist.

18 R. at 1203.

2. References in Closing Argument:

As to Factor 3(B), the prosecutor argued:

> You can consider Tracie McBride's young age, her slight stature, her background, her unfamiliarity with the San Angelo area. Again, you recall the testimony concerning Tracie. She is barely five feet tall [and] weighs approximately 100 pounds. He picks the ideal victim. Someone that is small, certainly has no semblance of the training that he has. He gets someone that has recently come to the San Angelo area so she has no familiarity. I mean, once she gets off the base she has no idea where she is. And all these are factors that you may consider.

25 R. at 2733-2734

As to Factor 3(C), the prosecutor argued:

> And finally you can consider as an aggravator Tracie's personal characteristics and the effects of the instant offense on her family.
>
> Let me talk a minute about Tracie McBride. You heard about this young woman, you heard about her from her mother, you heard [in the guilt phase] from her friends that knew her. She was special, she was unique, she was loving, she was caring, she had a lot to offer this world, but not anymore thanks to the defendant. The effect on the family, you have seen her mother on the stand. You have heard that her father has nightmares about trying to put her head back together again. You have seen the effect that it had on the mother, her brothers and sisters, her friends. You know, what can I say that could drive that home having witnessed the mother having to testify as to the loss of a daughter.

25 R. 2734.

3. References in Rebuttal Argument:

As to Factor 3(B), the prosecutor argued:

> You can look at her training and her experience in relation to this 22-year Army ranger. Those are things you can look at. The court, the law says you can. And you can ascribe them whatever weight you want. If you think they are important, say so by your verdict.

25 R. at 2776.

As to Factor 3(C), the prosecutor argued:

> There are other aggravators that the law also says you can look at, and we have alleged those because we have to allege them before we can bring them to you. We can talk to you, there is a forum in this country for victims too, and we can bring you things about Tracie McBride. In fact, I think just about everyone of you on your questionnaires talked about how you would want to know something about the victim, what kind of person she is. And that is admirable, because I think they are forgotten. A lot of what [defense counsel] said is absolutely right. They are forgotten a lot. But you wanted to know information and we brought you that information. I am sorry that I can't bring commendations that Tracie McBride got from Desert Storm and Grenada and all of her experiences in the Airborne Rangers because Louis Jones didn't let her get there.

25 R. 2775.

Later, the prosecutor responded to defense arguments by arguing:

> They want you to walk a mile in his shoes. You are allowed to walk a mile in Tracie McBride's boots for a minute. You are allowed to do that. She was a special person. I didn't know her. I feel like I know her, but I

> didn't know her. Thanks to Louis Jones, we never will. So the best we can do is bring precious photographs that this family has provided, and we can hear about all she contributed in her 19 years. We can hear about that. And then we can hear about her wanting to get married, and wanting to have kids, wanting ironically enough to be either a teacher of maybe even an airborne ranger. The irony is amazing.

25 R. 2783-2784.

Finally, the prosecutor reminded jurors of the victim at various times in addressing a statutory aggravating factor, the defense mitigation, and the ultimate issue of whether defendant should be sentenced to death. See 25 R. 2773 (arguing that defendant caused grave risk of death to another (Peacock): "If you don't think that that man sitting right over there when he is wielding a blunt instrument to somebody's head isn't causing a grave risk, tell Tracie McBride's parents that"); 25 R. 2775 (responding to defense mitigation regarding defendant's allegedly abused childhood: "Maybe it would have been better if Tracie McBride had been set on the stove and sexually assaulted, abused all her life. Would people feel sorry for her then."); 25 R. 2785 (arguing against non-capital sentence, noting that Tracie McBride's parents did not have option of having their daughter alive but in prison).

APPENDIX D

RELEVANT FEDERAL RULES

1. Fed. R. Crim. P. 30 provides, in relevant part:

* * * * *

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

2. Fed. R. Crim. P. 52 provides:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3. Fed. R. Evid. 606(b) provides:

> **Inquiry into validity of verdict or indictment.** Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence

was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

4. Fed. R. Evid. 1101(d) provides, in relevant part:

Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

* * * * *

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation * * * .

No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

I. THERE WAS AT LEAST A REASONABLE LIKELIHOOD THAT THE JURY INSTRUCTIONS AND VERDICT FORM LED THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT.

A. It Was at Least Reasonably Likely That the Jury Misinterpreted the Jury Instructions and Verdict Form in the Fashion Urged by Petitioner.

Contrary to respondent's characterization, petitioner does **not** contend that the jurors believed that, in the event of nonunanimity as to penalty, "[they] would be required to **recommend** a sentence less severe than life without release." Resp. Br. 11 (emphasis added); *see also ibid.* at 8, 15-18. Rather, petitioner's contention is that, in the event of nonunanimity, the jury would have felt obliged to indicate its disagreement by returning the sentencing verdict form with Decision Form D (J.A. 59) signed by the jury foreperson – and that Decision Form corresponded to a sentencing outcome whereby (1) the court would impose sentence; and (2) said sentence would likely be a "lesser" sentence.

Respondent contends that, because the jury was explicitly told that any sentencing recommendation must be unanimous (J.A. 43), the jury could not reasonably have concluded that nonunanimity would result in any sentence, much less a less-than-life sentence. *See* Resp. Br. 14-15, 18-19. But the fact that any jury sentencing recommendation/verdict must be unanimous in order to be binding on the sentencing court, *see* 18 U.S.C. §§ 3593(e) & 3594, does **not** mean that there are no sentencing **consequences** flowing from nonunanimity. Nothing in these instructions told the jury there were not.[1]

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[1] Respondent's suggestion (Resp. Br. 17, 19, 28-29, 31, 33) that there is some sort of "background" presumption or rule, known to capital sentencing jurors, that nonunanimity results in a hung jury requiring another sentencing proceeding is without

Quite the opposite was true: the jury was led to believe that a failure to agree would require it to return the sentencing verdict form with Decision Form D signed by the jury foreperson.[2] *See* Pet. Br. 21-24.

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merit for the reasons discussed at pp. 9-10, *infra*. In reality, if there is any "background rule" of sentencing in American criminal law with which lay jurors are likely to be familiar, it is that sentencing is a duty of judges, not juries. Since jury sentencing in capital cases is the exception to this general rule, jurors would likely assume that the judge would take over the sentencing function if they failed to agree on the sentence to be imposed.

[2] In a nutshell, this was so for the following reasons: First, the jury was never told that it could return an uncompleted verdict form in the event of a deadlock on a sentence recommendation. On the contrary, the jurors were explicitly told to use Decision Forms C (life without release) or D ("some other lesser sentence") of that verdict form if, among other eventualities, "[they were] not unanimous in recommending that a sentence of death should be imposed." (J.A. 47-48). But the jury was told, both in the instructions (J.A. 48) and in Decision Form C itself (J.A. 58), that Decision Form C should be filled out if the jury unanimously recommended life without release. This left only Decision Form D for the nonunanimous jury.

And nothing in Decision Form D (J.A. 59) or the instructions pertaining to it (J.A. 48) suggested that unanimity was required for Decision Form D to be filled out. Indeed, the conspicuous absence of any reference to unanimity for this Decision Form suggested quite the opposite, as did the fact that only the jury foreperson was required to sign Decision Form D. (Decision Form B [death] and Decision Form C [life without release], in contrast, explicitly required unanimity and required the signatures of all the jurors.) Finally, the jurors would have been bolstered in their conclusion by the fact that, in contrast to their treatment of the death or life without release options, the instructions often omitted any mention of unanimity in connection with the "lesser sentence" option contained in Decision Form D. *See* Pet. Br. 21-22.

When the instructions and verdict form are viewed as a whole, it becomes clear that a deadlocked jury would likely have reconciled the instruction relied on by respondent with the later ones and with the verdict form by selecting Decision Form D as the only recourse available to it if its efforts to achieve unanimity failed – unless, of course, the minority jurors solved the problem by giving in to the majority.[3] Absent such a reconciliation, the instruction relied on by respondent was simply inconsistent with the court's subsequent instructions and with the verdict form, and was therefore insufficient to correct them. *See Francis v. Franklin*, 471 U.S. 307, 322-25 (1985); *Cabana v. Bullock*, 474 U.S. 376, 383-84 n.2 (1986). And returning the verdict form with Decision Form D signed clearly indicated to the jury that the court would impose "some other lesser sentence" – "other" and "lesser," that is, than death or life without release. Thus, it was **at least** reasonably likely that the jury instructions and verdict form in this case led the jury erroneously to believe that a deadlock on the penalty recommendation would result in a court-imposed sentence less severe than life imprisonment.[4]

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[3] Respondent is not assisted by its reliance (Resp. Br. 21) on the instruction (J.A. 44) that the jurors were "not to be concerned with the question of what sentence the defendant might receive in the event [they] determine[d] not to recommend a death sentence or a sentence of life without release," because "[t]hat [was] a matter for the court to decide in the event [the jury] conclude[d] that a sentence of death or life without release should not be recommended." While jurors are presumed to follow their instructions, jurors deadlocked between death or life without release would not believe that such an instruction pertained to them, because these jurors had not "determine[d] not to recommend a death sentence or a sentence of life without release."

[4] While the reasonable likelihood of this highly prejudicial juror misinterpretation is apparent from the instructions and verdict form themselves, respondent's insistence to the contrary is especially strained in light of the affidavits demonstrating

B. The Court Should Correct This Fundamental Error.

Respondent argues that, because petitioner did not object to the instructions and verdict form prior to their submission to the jury as required by Federal Rule of Criminal Procedure 30, any error is not subject to plenary review, but rather only "plain error" review under Federal Rule of Criminal Procedure 52(b). Resp. Br. 20-22. But Rule 30, by its own terms, applies only to "trial," whereas the FDPA carefully distinguishes the "trial" (on guilt/innocence) from the "separate sentencing hearing" at issue here.[5] Rule 52(b) is

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that **this** jury **actually** misinterpreted the instructions just as described. (J.A. 66-68, 78-80). Although the affidavits are not necessary to rule in petitioner's favor, this case is surely one of "the gravest and most important cases," *McDonald v. Pless*, 238 U.S. 264, 269 (1915), where refusal to consider them would "violat[e] the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851). When – as here – jurors voluntarily come forward, on their own initiative, and inform the court that they agreed to a death sentence based upon a fundamental misunderstanding of their instructions, courts should not turn a blind eye to such compelling evidence. Respondent's concerns about post-verdict juror harassment by disappointed litigants (Resp. Br. 23) may be adequately addressed by local rules of court prohibiting litigants or their attorneys from contacting jurors without leave of court. *See, e.g.*, N.D. TEX. LOC. CRIM. R. 24.1.

Finally, contrary to respondent's suggestion (Resp. Br. 22 n.5), the question whether these affidavits may be considered is "fairly included" within the question whether the jury was reasonably likely to have misinterpreted the instructions and verdict form. *Cf. United States v. Zolin*, 491 U.S. 554, 564 n.8 (1989). Indeed, here, unlike in *Zolin*, the subsidiary question was explicitly ruled on by the Court of Appeals (J.A. 104-106) and expressly mentioned in petitioner's pleadings in this Court as "fairly included." Pet. Rply. to Br. Opp. 7 n.4.

[5] *See, e.g.*, 18 U.S.C. § 3593(b) (if defendant is found guilty, "judge who presided at the **trial** . . . shall conduct **a separate sentencing hearing** to determine the punishment to be imposed") (emphasis added); *see also* 18 U.S.C. § 3593(b)(2)(B) (again distinguishing between sentencing "hearing" and the "trial" on guilt/innocence).

likewise inapplicable because it applies only where the particular error was "not brought to the attention of the court." FED. R. CRIM. P. 52(b). Here, the error **was** brought to the attention of the district court, both by petitioner's proposed instructions and indisputably by petitioner's post-sentencing motions. (J.A. 60-68, 75-80).

But even if the error were not properly preserved, plenary review is nonetheless required under the "arbitrary factor" review compelled by the FDPA.[6] *See* 18 U.S.C. § 3595(c)(1). As discussed in petitioner's opening brief (Pet. Br. 26-28), other jurisdictions with "arbitrary factor" review of death sentences (whose views Congress must be presumed as having adopted by its adoption of the "arbitrary factor" language) have held that instructional errors – and particularly instructional errors of the type at issue here – may interject impermissible "arbitrary factors" into the imposition of the death penalty.[7] And these "arbitrary

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[6] Contrary to respondent's contention (Resp. Br. 26 n.6), this statutory claim is properly before the Court. First, it is fairly included within the wording of the question presented as framed by the Court on its grant of certiorari (the same wording, notably, as in respondent's Brief in Opposition). Moreover, the statutory claim was raised and litigated in the Court of Appeals. Finally, because the Court must consider nonconstitutional grounds for decision prior to reaching constitutional questions, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981), petitioner's claim that jury misinterpretation of the jury instructions and verdict form interjected an "arbitrary factor" under the FDPA is fairly included in his claims that such misinterpretation violated his constitutional rights. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994) (*Teague* retroactivity issue was fairly included within question raising correctness of constitutional ruling on the merits).

[7] While apparently conceding that the term "arbitrary factor" in the FDPA should be interpreted in light of the meaning given to

factor" jurisdictions have reviewed these instructional errors **irrespective of whether the error was properly preserved by objection.**[8] *See* Pet. Br. 26-27 n.22.

Indeed, Congress further indicated its adoption of this rule for appellate review under the FDPA when it specified that the third, error-correction prong of review under the statute would be limited to errors that were "properly preserved for appeal under the rules of criminal procedure." 18 U.S.C. § 3595(c)(2)(C). The obvious inference from this specific reference to error-preservation is that Congress did not intend to require such preservation for sentence review for "passion, prejudice, or any other arbitrary factor" under § 3595(c)(2)(A).[9] *See, e.g., Lindh v. Murphy*, 521 U.S. 320, ___, 117 S.Ct. 2059, 2063-65 (1997).

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that term in the jurisdiction(s) from which Congress borrowed it, respondent asserts, without authority, that only the interpretation given by the courts of **Georgia** is relevant. Resp. Br. 27 n.8. There is no warrant for such a limitation. Although the FDPA's "arbitrary factor" language may have originated in the Georgia statute reviewed by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), Congress was surely also aware of the constructions given to the identical language in other "arbitrary factor" state jurisdictions. In any event, Georgia has also held that instructional error may interject or constitute an "arbitrary factor" within the compass of the Georgia statute. *See, e.g., Conner v. State*, 251 Ga. 113, 121, 303 S.E.2d 266, 275 (collecting examples), *cert. denied*, 464 U.S. 865 (1983); *Spraggins v. State*, 240 Ga. 759, 763, 243 S.E.2d 20, 23 (1978).

[8] This is true even in Georgia, which is apparently the only "arbitrary factor" jurisdiction whose jurisprudence respondent accepts as relevant in interpreting the FDPA. *See, e.g., Conner*, 251 Ga. at 121, 303 S.E.2d at 275 (under "broad" review for "arbitrary factors," "[w]e have set aside death penalties where the trial court failed to properly charge the jury at the sentencing phase, **whether or not such failure was objected to at trial or raised on appeal**") (emphasis added and citations omitted).

[9] Independent "arbitrary factor" review under the FDPA assumes even greater importance in this particular case. Because this case was the very first trial in the nation conducted

Contrary to respondent's suggestion (Resp. Br. 26-27), petitioner does **not** argue that **every** legal error in a death penalty proceeding will interject, or constitute, an "arbitrary factor" correctable despite lack of objection by the defendant.[10] Rather, "arbitrary factors" are probably best understood as a discrete subset of errors going to the very heart of the reliability and accuracy of the capital sentencing determination. But this case does not require the Court to define the limits of what is, and what is not, an "arbitrary factor" under the FDPA because the error in this case clearly qualifies.

In sum, the jury was at least reasonably likely to have misinterpreted the instructions and verdict form as petitioner urges. This highly prejudicial[11] error interjected an

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under the newly-enacted FDPA procedures, petitioner would encounter special problems in establishing that this or almost any other procedural error at sentencing was sufficiently "plain" or "obvious" to warrant correction under Fed. R. Crim. P. 52(b). But to carry out a death sentence imposed by means of a grossly flawed procedure, simply because neither the court nor counsel knew quite how to implement the FDPA in the first run-through, would be an intolerable violation of the principle that "any decision to impose the death penalty be, and appear to be, based on reason rather than caprice and emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality op.). Independent review for "arbitrary factors" thus serves an important "safety net" function, ensuring that no defendant will be executed due to the courts' and counsel's inexperience with a novel sentencing procedure.

[10] For example, mere technical errors (*e.g.*, an error in laying the foundation for documents whose reliability is not questioned) or other errors that do not impugn the reliability or accuracy of the death penalty determination (*e.g.*, the admission of otherwise reliable evidence obtained in violation of the Fourth Amendment) would not qualify as "arbitrary factors" correctable despite the lack of objection.

[11] Quoting the Court of Appeals, respondent disputes any claim of prejudice, claiming that "the outcome could just as

"arbitrary factor" into the proceedings and violated petitioner's constitutional rights.

II. PETITIONER WAS ENTITLED TO A JURY INSTRUCTION THAT THE JURY'S FAILURE TO AGREE ON A SENTENCING RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.

A. Petitioner's Proposed Instructions Correctly Stated the Law.

In disputing petitioner's contention that a jury deadlock would cause court-sentencing under 18 U.S.C. § 3594, respondent again argues that "the FDPA requires jury unanimity for any sentencing recommendation." Resp. Br. 29, *citing* 18 U.S.C. § 3593(e). This is true as far as it goes: any jury sentencing "recommendation" (*i.e.*, binding disposition which the court must enforce under § 3594) must indeed be unanimous. But § 3593(e) says nothing about the situation in which the jury is **not** unanimous and hence does **not** return a "recommendation" under the FDPA. That situation is, as discussed in

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easily have turned out the other way with the jurors not supporting the death sentence convincing the death prone jurors to impose life without the possibility of release." Resp. Br. 22. Even if this doubtful assertion were correct, the instructional error here still introduced an unacceptable level of arbitrariness into the sentencing process. *See Beck v. Alabama*, 447 U.S. 625, 643 (1980) ("In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case."). Capital sentencing should not be transformed into a game of "chicken," in which life or death turns on the completely random happenstance of whether the particular "life" jurors or "death" jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors.

petitioner's opening brief, Pet. Br. 33-35, covered by the "otherwise" clause of § 3594.[12]

Respondent also attempts to rely on some sort of "background" rule that "the government is entitled to retry a case if the jury cannot reach a unanimous verdict." Resp. Br. 29; *see also ibid.* at 17, 19, 28-29, 31, 33. There is no such "background" rule for capital sentencing proceedings. The authority cited by respondent is for trials on guilt or innocence and has no relevance to the bifurcated sentencing proceeding at issue here – a creature of relatively recent origin. Indeed, respondent undermines its own case for a background rule by pointing out the large number of state jurisdictions in which nonunanimity results in a noncapital sentence by the court and the relative paucity of capital sentencing schemes that require a new sentencing hearing when the sentencing jury hangs. *See* Resp. Br. 32 & Apps. A & B.

In fact, the **true** background rule against which the FDPA was enacted was precisely the opposite. The FDPA is closely patterned after the capital sentencing procedures of the Anti-Drug Abuse Act of 1988 (ADAA), 21 U.S.C. § 848(e)-(r) – which statutes include a similar "otherwise" clause[13] that has been unanimously construed to mandate

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[12] Respondent's argument (Resp. Br. 30) that the "otherwise" clause pertains only to the situation where the jury unanimously recommends a lesser sentence not only disregards the plain meaning of the word "otherwise"; it also fails to take account of the differences between the first and second sentences of § 3594. If Congress had intended for the statute to read as respondent argues, Congress could easily have made the second sentence parallel with the first sentence, as follows: "**Upon a recommendation under section 3593(e) that the defendant should be sentenced to some other lesser sentence**, the court shall impose any lesser sentence that is authorized by law." But Congress did not do so, and that failure is telling.

[13] Under 21 U.S.C. § 848, the jury "by unanimous vote . . . shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without

that a jury's failure to achieve unanimity on the sentencing recommendation results in court-sentencing.[14] By incorporating § 848's "otherwise" language into the FDPA, Congress must be presumed to have known how that language had been judicially interpreted, *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978), and to have ratified that interpretation.[15] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983).

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possibility of release or some other lesser sentence." 21 U.S.C. § 848(k). "Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence other than death authorized by law." 21 U.S.C. § 848(l).

[14] *See, e.g., United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993); *United States v. Spivey*, 958 F.Supp. 1523, 1526-27 (D.N.M. 1997); *United States v. Pitera*, 795 F.Supp. 546, 552 (E.D.N.Y. 1992).

[15] To be sure, the FDPA differs from the ADAA in one respect. Under the ADAA, the only binding recommendation a jury could make was one of death. The FDPA, on the other hand, allows the jury, by unanimous vote, to make any of **three** binding sentence recommendations: death, life without release, or some other lesser sentence. But nothing in the legislative history of the FDPA indicates that this variance was intended to displace the "deadlock-equals-court-sentencing" rule of the ADAA. Indeed, as petitioner has already pointed out, Pet. Br. 34-35, the only mention of a hung jury in the entire legislative history of the FDPA is found in H.R. Rep. No. 103-467 (1994) (explaining the House Judiciary Committee version of the virtually identical Senate bill which ultimately became the FDPA), which specified that if a jury failed to reach a unanimous decision under § 3593, "the judge shall impose the sentence pursuant to Section 3594."

The best explanation for Congress's selection of the three-way sentencing option of the FDPA is that Congress wished to avoid a problem identified by this Court's then-recent decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, the Court held that where the actual alternative to the death penalty is life without possibility of parole, and where the prosecution relies on the defendant's alleged future dangerousness as a reason favoring the death penalty, due process requires that the

Nor is respondent assisted by its reliance (Resp. Br. 29, 31) on 18 U.S.C. § 3593(b)(2), which permits a separate sentencing hearing "before a jury impaneled for the purpose of the hearing if . . . the jury that determined the defendant's guilt was discharged for good cause." Respondent claims that, unless the phrase "discharged for good cause" is interpreted to include a jury discharged because of unbreakable deadlock, § 3593(b)(2) is rendered meaningless. This claim is incorrect: there are many reasons why a jury may be discharged besides jury deadlock, *e.g.*, exposure to prejudicial extrinsic information or publicity, or juror illness resulting in diminution of the jury panel to a number below the permissible complement of jurors.

In sum, petitioner's reading is not only compelled by the plain text of the statutes involved; it is the reading which best harmonizes all of the provisions of the FDPA.

B. Petitioner Was Entitled to an Instruction on the Effect of Jury Deadlock.

Respondent objects that an instruction on the effect of jury deadlock "would be an open invitation for the jury to

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sentencing jury be informed about the defendant's ineligibility for parole. A binary choice between a unanimous jury recommendation of death or not (like that in the ADAA) risked violating *Simmons*, at least in cases (like this one) where life imprisonment was the only statutorily-authorized alternative to the death penalty, and where (as in most federal death penalty prosecutions) the prosecution alleges future dangerousness as a nonstatutory aggravating factor.

Thus, it is most likely that the FDPA's three-way jury sentencing option simply reflects the fact that Congress, to avoid a *Simmons* problem, wished to empower the jury to select from the full range of available punishments. Because unanimity is a normal feature of jury decisionmaking, the requirement that any of the jury's choices be unanimous does not reflect any intent to import into capital sentencing the guilt-phase rule that a hung jury results in a mistrial and a retrial before a new jury.

avoid its responsibility and to disagree," which "would frustrate the strong interest in jury unanimity, which is a bedrock principle of our jury system." Resp. Br. 35 (internal quotation marks and citation omitted). But these fears are groundless. First, juries are generally instructed – as was the jury in this case – that

> **[i]t is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so.** Each of you must decide this remaining question for yourself, but only after full consideration of the evidence with the other members of the jury. **While you are discussing this matter, do not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are wrong.** But do not give up your honest beliefs as to the weight or effect of the evidence solely because others think differently or simply to get the case over with.

(J.A. 46) (emphasis added). Because jurors are presumed to follow their instructions, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987), there is no reason to believe that jurors will disregard their oaths and fail to comply with the instruction that they should reach agreement if possible.[16] That being the case, there is no reason to withhold from juries the fact that their failure to agree on a sentence will itself result in a sentence.[17]

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[16] Moreover, under this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny, only persons who are capable of considering either death or non-death sentences are permitted to serve on capital sentencing juries. Thus, there is even less likelihood of "rogue" jurors who will derail deliberations and hang the jury simply to achieve one outcome or another.

[17] Indeed, quite the opposite is true: it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

But whether or not one agrees that juries should always be told of the consequences of deadlock, there can be no disagreement that juries should not be given an **inaccurate** or **misleading** impression of what those consequences might be – as the jury in this case was.[18] A jury deadlock instruction was necessary in this case to correct the erroneous impression, conveyed by the instructions and verdict form actually submitted, that jury deadlock would result in a court-imposed less-than-life sentence. Accordingly, the Court should reverse the judgment below.

III. THE SUMMARY ASSERTION OF HARMLESS ERROR BY THE COURT OF APPEALS, WITHOUT ANY ANALYSIS OR EXPLANATION BASED UPON THE RECORD, REQUIRES REVERSAL.

A. The Two Nonstatutory Aggravating Factors Found by the Jury Were Vague, Overbroad, and Duplicative.

Relying almost entirely on *Tuilaepa v. California*, 512 U.S. 967 (1994), respondent faults the Court of Appeals' holding that two aggravating factors found by the jury were vague, overbroad, and duplicative. Resp. Br. 39. But respondent overlooks the critical difference between a weighing statute like the FDPA, and a nonweighing statute like California's.[19] In California, statutory aggravating circumstances serve only to render the defendant death-eligible. At that point, the jury is instructed to consider a lengthy list of factors (some

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[18] *See Gregg, id.*, at 190 ("accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision").

[19] "The difference between a weighing State and a nonweighing State is not one of semantics . . . but of critical importance." *Stringer v. Black*, 503 U.S. 222, 231-32 (1992). In a weighing jurisdiction it is especially important that "aggravating factors be defined with some degree of precision." *Stringer*, 503 U.S. at 229.

aggravating, and some mitigating) in deciding whether to impose the death penalty. The jury is not required to make specific findings as to each factor, nor to weigh in aggravation any of the particular factors.

Under the weighing statute in this case, by contrast, jurors were required to answer either "yes" or "no" as to the existence of each of the aggravating factors.[20] (J.A. 51-53). Petitioner's jury was also instructed that they **must** consider in the weighing process **each** aggravating factor that they found beyond a reasonable doubt, and they were not to consider any aggravating factors not so proven. (J.A. 43).

Because Congress chose to adopt a weighing statute in which aggravating factors channel and guide the jury's discretion, each aggravator must actually serve that narrowing function. If a factor is too vague to guide the jury's discretion, that factor is invalid. *See Stringer*, 505 U.S. at 235 ("Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content.").

The nonstatutory aggravating factors that were submitted in this case were so vague that the jury could not rationally "find" them beyond a reasonable doubt, or by any other standard of proof. Factor 3(B) required the jury to "find," among other things, the defendant's "background";

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[20] The Court in *Tuilaepa* drew a distinction between "propositional" and "nonpropositional" aggravating factors. A propositional factor requires the jury to make a finding whether the factor has been proved; when such propositional factors are vague, it creates "an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*, 408 U.S. 238 (1972)." *Id.* at 974-75. A nonpropositional factor, on the other hand, does not require a "yes" or "no" answer to a specific question, but instead only points the sentencer to a subject matter that is not required to be weighed as an aggravating factor. Such factors – as the selection stage factors were in California – need not be defined with the same precision. *Id.*

Factor 3(C) required the jury to "find" the victim's "personal characteristics." A jury could not possibly "find" whether the victim's "background" or her "personal characteristics" had been proved beyond a reasonable doubt. Thus, the jury's interpretation of the aggravating factors "can only be the subject of sheer speculation." *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980).

Respondent asserts that because the challenged aggravating factors were nonstatutory, they need not meet the same standard as statutory aggravating factors. Again, respondent has confused what is **permissible** under a statute such as California's with what is **required** under the FDPA. Consistent with the FDPA, *see* 18 U.S.C. § 3593(e), the jurors here were instructed that they "must weigh any aggravating factors that they unanimously found to exist – whether statutory or nonstatutory. . . . " (J.A. 43). And contrary to respondent's assertion that the jury must find that a factor "aggravated the crime before the factor could be weighed" (Resp. Br. 44), the jury was given no such instruction. The jury was required only to make a finding that the factor had been proved to be factually true. If the jury so found, it had to weigh the factor as aggravating – that is, it was required by the instructions to place the factor on death's side of the scale.

In defending the validity of Factors 3(B) and 3(C), respondent stresses that sentencing juries may consider the background and personal characteristics of the victim. Resp. Br. 41. Petitioner does not contend otherwise. The problem with these factors is the unacceptably vague wording, combined with the FDPA's requirement that every factor found be weighed, and weighed as evidence supporting a death sentence. Nothing in the wording of Factor 3(B) makes clear to the jurors that they should focus on the "particular vulnerability" of the victim. Additionally, the vagueness of Factor 3(C) (concerning the victim's personal characteristics) could lead to the type of "comparative judgment" the Court disapproved in *Payne v. Tennessee*, 501 U.S. 808, 823 (1991): the jury could have weighed the victim's relative worth to

the community, or impermissibly compared the victim's and the defendant's race or appearance or socioeconomic status.

Absent any explanation of how the victim's "background" and her "characteristics" exacerbated the defendant's culpability, those factors could fairly be found in every homicide, and are accordingly unconstitutional. *Arave v. Creech*, 507 U.S. 463, 474 (1993). This vagueness and overbreadth is particularly problematic because the two factors substantially duplicate and overlap each other. Respondent argues that the two factors do not overlap because they were intended to direct the jury's attention to separate areas of aggravation. But, as the Court of Appeals held, the plain meaning of the term "personal characteristics" used in 3(C) necessarily includes "young age, slight stature, background, and unfamiliarity" which the jury was required to consider under 3(B). (J.A. 118). Duplicative aggravating factors in a weighing statute like the FDPA necessarily skew the weighing process in favor of death.[21]

Plainly, Congress did not intend for the government to rely upon vague, overbroad, and duplicative aggravating ... such as these. This Court should make clear to other

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[21] As the Tenth Circuit has held in *United States v. McCullah*, F.3d 1087, 1112 (10th Cir. 1996), "the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." The court concluded that

> [T]he use of duplicative aggravating factors creates an unconstitutional skewing of the weighing process which necessitates a reweighing of the aggravating and mitigating factors.
>
> To the extent that Congress wants a particular aggravating factor to receive enhanced weight in the sentencing process, it can provide for such enhancement in the statute itself. However, Congress elected not to do so, and the prosecutor cannot attempt to circumvent Congress's inaction by introducing the same factor in a different guise a second time.

lower federal courts construing this statute that aggravating factors such as these are impermissible under the FDPA.

B. Respondent Has Not Proved that the Errors are Harmless Beyond a Reasonable Doubt.

Respondent cites no cases that have upheld a harmless error determination as perfunctory as the one performed by the Court of Appeals here. Resp. Br. 49-50. Rather, respondent essentially asks this Court to perform its own harmless error analysis, and proposes two ways in which the Court might do so. Resp. Br. 45-49.

First, respondent asks this Court to find, beyond a reasonable doubt, that the result would have been the same had the invalid aggravating factors been properly defined.[22] In an attempt to carry that burden, respondent has rewritten the factors and converted them into a propositional form.[23] Resp. Br. 46. But respondent's reformulation does more than

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[22] In this argument, respondent relies upon a statement from *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990), in which this Court noted that "[i]t is perhaps possible" that the state supreme court had considered whether "beyond reasonable doubt the result would have been the same had the [invalid] aggravating circumstance been properly defined in the jury instructions." But this Court has never actually approved such a mode of harmless error analysis. Moreover, even if such analysis were permissible in some cases, it would be inappropriate here. In *Clemons* the vague aggravator at issue – whether the murder was "especially heinous, atrocious, or cruel" – had previously been given a fixed, narrowed definition by the Mississippi Supreme Court. Thus, it was clear in Mississippi what the properly defined aggravating factor was meant to encompass. Determining whether the jury in this case would have found aggravating factors that respondent has reformulated for the first time in this Court is a more speculative undertaking.

[23] By reformulating the aggravating factors, respondent implicitly concedes both aspects of the vagueness problems identified by petitioner – the nonpropositional nature of the factors, and the fact that, as written, the factors do not aggravate this homicide.

convert the grammatical structure of the two factors; the changes are not "minor." Rather, respondent has inserted crucial wording into both factors in order to narrow and guide the jury's discretion. The reformulation of Factor 3(B) adds an assertion that the victim was "particularly vulnerable" because of certain characteristics; the reformulation of Factor 3(C) adds an assertion that the murder "caused exceptional harm" because of the victim's personal characteristics.

Respondent then **assumes** that the jury would have made affirmative findings as to those reformulated questions. However, under this test, respondent's statutory burden is to **prove** beyond a reasonable doubt that the result would have been the same had the rewritten factors been submitted to the jury. But respondent's speculations and assumptions about what the jury would have found omit an important aspect of this record: clearly, the jury did not take the most adverse possible view of petitioner's crime or his character. For example, the jury rejected three aggravating factors alleged by the prosecution: that petitioner committed the murder "after substantial planning and premeditation"; that the "defendant constitutes a future danger to the lives and safety of other persons"; and that he "knowingly created a grave risk of death to one or more persons in addition to the victim." These findings indicate that at least some of the jurors rejected the government's portrait of petitioner as a predatory cold-blooded killer, and viewed the murder as an impulsive or even aberrational act. Moreover, jurors found that the defendant had proved the existence of **eleven** mitigating factors.

Given these other findings by the jury, it cannot be known beyond a reasonable doubt that the jury would have found the reformulated factors. It is not surprising that the jury "found" the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; it does not follow that the jury would have also found that the victim – a soldier in the United States Army – was "particularly vulnerable" in a way that exacerbated petitioner's culpability. Likewise, although the jury "found" the victim's "personal characteristics," it does not follow that the

jury inevitably would have found that the murder caused "exceptional harm" that aggravated this homicide. Moreover, it cannot be known that the jury would have accorded the same weight to those more narrow reformulated factors that it did to the vague and overbroad factors actually submitted to the jury.

Alternatively, respondent argues that this Court should find that the result would have been the same had the two aggravating factors not been submitted to the jury at all because the government "did not dwell" (Resp. Br. 48) on the invalid factors in the sentencing phase. Resp. Br. 47-49. Respondent's own brief refutes this claim. In its argument that the jury would have made affirmative findings as to its "reformulated" aggravating factors, respondent emphasizes the importance of the two factors in the government's case, and cites at least ten different references to the nonstatutory aggravating factors in the prosecutor's opening statement and closing argument at the sentencing phase.[24] *See* Resp. Br. 46 and App. A-7 – A-10.

This inconsistency in respondent's brief demonstrates that any assertion concerning how much weight the jury gave to the aggravating factors at issue is sheer speculation. As this Court has noted, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court

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[24] Also, as respondent notes (Resp. Br. 48), the evidence at the sentencing phase included all the evidence presented at the guilt phase. Much of that evidence related to the background and the characteristics of the victim.

Furthermore, in considering the relative importance of the evidence and argument relating to the invalid factors, it must be noted that much of the government's evidence and argument was designed to prove the three aggravating factors that the jury failed to find. For example, much of the prosecution's closing argument was designed to convince the jury to find that the petitioner committed this crime after substantial planning and that he would constitute a future danger. As a result, the evidence and argument relating to the invalid aggravators took on added importance.

may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992).

Moreover, as demonstrated in petitioner's opening brief, the jury struggled with a close and difficult decision. The quantity and quality of mitigating evidence, and the jury's refusal to find three of the aggravating factors submitted by the government, indicate that the jury's decision was anything but a foregone conclusion. This record cannot support a finding beyond a reasonable doubt that the result would have been the same even without two of the four aggravating factors considered by the jury. In short, the record in this case makes a finding of harmless error "extremely speculative or impossible." *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990).

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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February 1999

(10)

No. 97-9361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS JONES, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that the deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to a reliable determination of guilt and to the imposition and execution of a just punishment.

The defendant in this case asks the Court to construe the Federal Death Penalty Act to allow a single juror to veto the death penalty despite the well-founded conclusion of the other

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

eleven jurors. Such an arbitrary mechanism for blocking justice would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In February 1995, defendant Louis Jones kidnapped Private Tracie McBride from Goodfellow Air Force Base near San Angelo, Texas. *United States* v. *Jones*, 132 F. 3d 232, 237 (CA5 1998). In the course of the abduction, he assaulted and severely injured another private who had attempted to rescue McBride. He subsequently confessed, after being advised of and waiving his right to remain silent. *Ibid.*

> "In his statement, Jones admitted to taking McBride back to his apartment, tying her up, and placing her in the closet. Jones stated that he then drove McBride to a remote location where he repeatedly struck her over the head with a tire iron until she was dead." *Ibid.*

He led investigators to the body. "The autopsy . . . revealed evidence of sexual assault." *Ibid.*

The jury convicted Jones of kidnapping resulting in a death, 18 U. S. C. § 1201(a)(2). *Jones*, 132 F. 3d, at 237-238. The jury further found that he intended to kill McBride. *Id.*, at 238. The jury also found unanimously and beyond a reasonable doubt two statutory aggravating factors: causing death during a kidnapping and committing the offense in an especially heinous, cruel, and depraved manner. *Ibid.*

The jury found two non-statutory aggravating factors unanimously, and ten mitigating factors were found by one or more jurors. *Ibid.* However, none of the mitigating factors was found unanimously, and only two were found true by even a majority of the jury. Brief for Petitioner 11-12, n. 7. Although defendant calls his psychiatric testimony "compelling," *id.*, at 45, only *one* juror believed it. *Id.*, at 12, n. 7. Similarly, eleven jurors rejected his claim of "severe mental or emotional disturbance," *id.*, at 11, n. 7, and two-thirds rejected the notorious "abuse excuse." See *ibid.*

After weighing the aggravating against mitigating factors, the jury unanimously recommended the death penalty. *Jones*, *supra*, 132 F. 3d, at 239.

Defendant appealed. Among other grounds, he contended that the jury should have been instructed that failure to reach a unanimous verdict would have resulted in a life sentence. *Id.*, at 242. He had requested an instruction expressly telling the jury that a single juror could veto a death sentence, prevailing over the contrary opinion of the other eleven jurors. Brief for Petitioner 9-10. The Fifth Circuit rejected this argument at its premise, holding that a hung jury would not require a life sentence, but instead that a second jury would be impaneled for a new sentencing hearing. *Jones*, 132 F. 3d, at 243.

On October 5, 1998, this Court granted certiorari limited to the questions stated *supra*, at i. This brief *amicus curiae* addresses only Question 1.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly interpreted the statute. Under the Federal Death Penalty Act, if the jury hangs at the penalty phase, the trial court must declare a mistrial and impanel a second jury.

The single-juror veto system urged by defendant would make the death penalty more arbitrary and more biased. The policy considerations underlying *Furman* v. *Georgia* require that courts construe statutes to make capital sentencing as evenhanded as possible. The choice of sentence should be based on the offense and the offender, not on the idiosyncracies or prejudices of the jurors. Random, idiosyncratic, or biased life sentences for defendants who deserve death are just as detrimental to evenhanded sentencing as the reverse situation. A single-juror veto would make such verdicts more likely.

The text of the statute is contrary to defendant's interpretation, and the scant legislative history does not support it. Defendant's interpretation would make two sections of the law contradict each other, while the Court of Appeals' interpretation makes them consistent.

ARGUMENT

I. Construing the statute to authorize a single-juror veto would make the federal death penalty more arbitrary and less evenhanded.

The long, sometimes winding, path of this Court's Eighth Amendment jurisprudence has produced two central principles. See *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring). One, which might be called the evenhandedness principle, is that the sentencer's " 'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Ibid.* (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (lead opinion)). The other, which might be called the individualization principle, is that the "sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." *Ibid.*

These two principles are sometimes referred to as being in "tension," *ibid.*; see *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994), and sometimes in more colorful language. See *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring). Even so, in *Tuilaepa* the Court noted a common principle: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." 512 U. S., at 973.

Minimizing bias and caprice is not the same as minimizing the number of death sentences rendered. The statutes struck down in *Furman* v. *Georgia*, 408 U. S. 238 (1972) were invalid because the persons sentenced to death under them were a "capriciously selected random handful." *Id.*, at 309-310

(opinion of Stewart, J.). The death penalty was "unusual" because it was not imposed often *enough* for death-eligible offenses. *Id.*, at 309. A system that makes an offense capital but grants mercy at random is just as capricious as one that imposes capital punishment at random.

Then there is the problem of *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). McCleskey's expert claimed that his study showed that defendants who had murdered white victims were more likely to be sentenced to death than defendants who had murdered black victims. See *id.*, at 320 (Brennan, J., dissenting). Fortunately, the problem is nowhere near as stark as the dissent made it out to be. See *McCleskey* v. *Kemp*, 580 F. Supp. 338, 379 (ND Ga. 1984) (study's race-of-victim bias finding based on flawed, incomplete models); Death Sentencing Issues: Hearings before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, 102d Cong., 1st Sess., ser. 33, p. 92 (1990) (statement of Stephen P. Klein, Ph.D.) ("controlling for several case characteristics shrunk [the] disparity to 3 percentage points—a difference that was not statistically significant"). Even so, any possibility of bias along these lines is a matter for public concern.

Justice Brennan was undeniably correct when he said that "diminished willingness to render [a death] sentence when blacks are victims[ ] reflects a devaluation of the lives of black persons." *McCleskey*, *supra*, 481 U. S., at 336 (dissent); see also Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev 95, 125 (1987). The problem, though, was that the injustice had not been committed in McCleskey's case. He was guilty and deserved his punishment. The injustice was committed in the black-victim cases where a death sentence should have been returned but was not. Those injustices, unfortunately, cannot be corrected on appeal. See *Bullington* v. *Missouri*, 451 U. S. 430, 446 (1981) (double jeopardy protection extended to capital sentencing decision).

Constitutional doctrine cannot cure every problem. In particular, its ability to minimize caprice and bias is limited, especially when the problem consists of random or biased grants of lenient sentences to undeserving defendants. A doctrine that the state cannot do justice in *any* case until it does justice in *every* case, thereby overturning the well-deserved sentences of guilty criminals, would be a disaster. That, in essence, was the proposal which this Court rejected in *McCleskey* and which Congress rejected when it deleted the so-called Racial Justice Act. See H. R. Rep. No. 103-711, Conference Report to accompany H. R. 3355, 103d Cong., 2d Sess., 388 (1994).

We must look elsewhere for answers. Legislatures should write sentencing procedure statutes that minimize the chances of arbitrary, capricious, or biased decisions *in either direction*. When statutes are subject to more than one interpretation, courts should construe them in a way to promote the goal of evenhandedness, at least when that can be done without damage to the goal of individualization.

Almost all of this Court's prior post-*Furman* capital cases have involved state statutes, so the task of construing the statutes has rested primarily with state courts. See, *e.g.*, *Zant* v. *Stephens*, 456 U. S. 410, 416-417 (1982) (*per curiam*) (certifying to state court a question on operation of state's capital sentencing system). Now, however, this Court must construe a federal statute. Construing an arguably ambiguous federal statute is a different task from deciding whether a state statute, as authoritatively construed by the state's high court, has crossed the constitutional line. The latter task involves delicate questions of federalism and judicial restraint.[2] Statutory construction, however, does not cross the state-federal line,

2. The surfeit of constitutional rules in this area has already stifled innovation. Anyone who proposes an improvement to a state's capital sentencing procedure is confronted with the objection that the existing statute has been upheld, and any change will produce a new constitutional challenge.

and the result can be changed by Congress if it proves to be unwise. Policy considerations therefore play a larger role here.

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Heirs of Boisdoré*, 8 How. (49 U. S.) 113, 122 (1850).[3] The object and policy of the statute tracks this Court's Eighth Amendment jurisprudence. Its purpose is not to give the defendant every possible opportunity to escape the death penalty, but rather to build a structured system of guided discretion, to make the implementation of capital punishment as evenhanded as possible within the constraints of the individualization requirement.

Congress's preference for evenhandedness over maximum leniency is evident at several points. In 18 U. S. C. § 3593(a), Congress authorized victim impact evidence to correct the imbalance which results from individualizing the defendant but not the victim. See *Payne* v. *Tennessee*, 501 U. S. 808, 825-826 (1991). Subsection (c) of that section imposes the burden of proof of mitigating factors on the defendant, thus reducing the chance that a factor would be found merely by the failure of the prosecution to rebut it. Subsection (e) directs the jury to the relatively structured question of whether mitigating factors outweigh aggravating, rather than the open-ended question of what sentence is appropriate. Significantly, language from earlier bills that the sentencer is never required to impose the death sentence was not included. Cf. H. R. Rep. No. 103-467, 103d Cong., 2d Sess., 21-22 (1994) (dissenting view of Mr. Hyde et al.) (arguing that the "never required" language leads to "unbridled and arbitrary discretion").

Finally, Congress made the jury's recommendation of a death sentence binding on the trial court, rather than giving the

3. This Court has quoted this maxim many times over the years. See, *e.g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987); *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U. S. 465, 478 (1997).

judge a broad override power. See 18 U. S. C. § 3594. An override would make the imposition of a death sentence depend, in a large degree, upon the defendant's "luck of the draw" in assignment of judges. This effect would be particularly pronounced in the federal system, with life tenure and no peremptory challenge of judges.

For the reasons stated in part II, *infra*, *amicus* believes this statute, on its face, requires a unanimous jury, and it provides for discharge of the jury and impaneling a new one in the event of deadlock. If, however, the Court should find any ambiguity in this regard, *amicus* submits that the Court should choose the interpretation which promotes evenhandedness in sentencing. That is the interpretation which minimizes the likelihood of a capricious or biased result *in either direction.*

In reviewing individual cases, appellate courts generally presume that jurors follow their instructions. That presumption "is a pragmatic one," and it is not rooted in an "absolute certitude" that it is true. See *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987). The presumption has its limits, and sometimes courts must recognize that jurors may not follow their instructions. See *ibid.* (*Bruton* rule).

In capital sentencing, jurors are instructed to base their verdicts solely on the authorized aggravating and mitigating factors. Factors which do not belong in the mix include "mere sympathy," *i.e.*, "emotional responses that are not rooted in the aggravating and mitigating evidence," *Brown, supra*, 479 U. S., at 542, beliefs or associations of the defendant, however vile they may be, if they are not relevant to an aggravating circumstance, *Dawson* v. *Delaware*, 503 U. S. 159, 167 (1992), and, of course, the race of the defendant or of the victim. Jurors should also not vote a particular way because they are so adamantly opposed to or in favor of capital punishment that they cannot or will not follow the law as set forth in the instructions. *Wainwright* v. *Witt*, 469 U. S. 412, 424 (1985) allows the removal of the hard core opponents, and *Morgan* v. *Illinois*, 504 U. S. 719, 729 (1992) requires removal of the hard

core supporters. Yet we all know that some such jurors do slip through, either because they lie in *voir dire* or because they do not fully realize the depth of their own feelings until the moment of truth. See *Witt*, 469 U. S., at 425-426.

A verdict which results from the idiosyncracies of jurors, rather than from the actual balance of aggravating and mitigating factors, is neither evenhanded nor individualized. Such verdicts do not apply the law equally to similarly situated defendants, and they are not based on the circumstances of the crime or the defendant's character or record. Cf. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

The danger of such a verdict would be greatly magnified by allowing a single juror to veto the considered decision of the other eleven. The *Witt*-excludable jurors who occasionally slip through *voir dire* would produce random life sentences for a few defendants who deserve death, based not on the defendant's culpability but only on his luck in getting such a juror. That would be a macabre lottery. No advanced statistics are needed to understand that if it is unusual for one such juror to be seated on a panel of twelve, the odds against such jurors making up all or most of a panel are astronomical. Thus, a requirement that the jury be unanimous, with a mistrial and new jury if it deadlocks, guards against this kind of randomness.

The arbitrariness of a single-juror veto was an important factor in the decisions in *Mills* v. *Maryland*, 486 U. S. 367 (1988) and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). The jury instructions in *Mills* arguably required the jury to disregard a mitigating circumstance if it could not agree unanimously on the existence of that circumstance. 486 U. S., at 371. A "no" finding on all mitigating circumstances required a verdict of death. See *id.*, at 389. Thus, the defendant raised the hypothetical possibility that eleven jurors could believe that six mitigating circumstances had been proven and that the death penalty was wholly inappropriate, yet the single holdout juror could force a death sentence. *Id.*, at 373-374. Such a veto power, the Court said, would be "the height of arbitrariness."

Id., at 374. "[I]t's difficult to imagin[e] a more arbitrary system than the luck of the draw: Do I get one juror?" *McKoy*, 494 U. S., at 453 (Kennedy, J., concurring in the judgment) (quoting oral argument in *Mills*).

It is not difficult at all, though, to imagine an *equally* arbitrary system. A system that allows a single juror out of twelve to block a death sentence is just as arbitrary as one that allows a single juror to impose it. A reverse-*Mills* arbitrariness could arise if a single juror found a mitigating circumstance true, and insisted it outweighed the aggravating circumstances, even though the other eleven were absolutely convinced it was false.[4] The choice between life or death should not depend upon the presence of one particularly gullible juror who is willing to accept "expert" testimony that the vast majority of people would reject as nonsense.

The Constitution may tolerate more arbitrariness on one side than it does on the other, but that does not make it good policy. Arbitrariness is an undesirable feature of a capital sentencing system, and it should not be read into a statute unless the language unmistakably requires it. Every presumption should be in favor of evenhandedness and against arbitrariness.

Even worse than arbitrariness is bias. A single juror with veto power might exercise that power based on a racist belief that killing a black person is not as great an offense as killing a white person. See *supra*, at 5. The requirement of unanimity reduces the chance of such a verdict. This effect was recognized in Congressional hearings on an earlier bill with similar language:

> "Mr. DENNIS [Assistant Attorney General]. 'Well, first of all, as a general proposition—and again, based on my own experiences—I think juries try to be conscientious. First of all, not everyone is responsible, but we have many procedures with regard to ensuring the fairness of the jury, and not all of them are even related to the death penalty.
>
> [Description of *voir dire*, challenges, and 18 U. S. C. § 3593(f) omitted.]
>
> " 'I think that is the way, and I think the bill is absolutely on target with how you deal with the potential that a verdict might be based upon bias. *Remember, it has to be unanimous. You know, one person might be biased, but the chances that one person is going to be able to persuade 11 others to his or her position based on bias— —*'
>
> "Mr. MCCOLLUM. 'That's what has always bothered— —'
>
> "Mr. DENNIS. 'I think, as a practical matter of understanding the procedures, you have to realize that these procedures should be adequate to the task.'
>
> "Mr. MCCOLLUM. 'You know, that's what has always bothered me about the statistics on this point, even though I don't doubt that there has been racial bias in sentencing in parts of the country from time to time. But overall, *with the unanimous jury requirement*, it seems to me, in this day and age, that I believe we have improved dramatically in regard to racial bias in this country. I just have a hard time believing there would be very many cases in this country ever in the future where you get *a full jury* that would be racially biased.' " Federal Death Penalty Legislation: Hearings before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, 101st Cong., 2d Sess., ser. 95, pp. 358-359 (1990) (emphasis added).

If the unanimity requirement is going to protect minority victims as well as minority defendants, then it must preclude nonunanimous life sentences as well as nonunanimous death sentences.

> "Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the

4. In the present case, for example, the psychiatric testimony was rejected by eleven jurors. See *supra*, at 2.

conscience of the community." *McKoy, supra*, 494 U.S., at 452 (Kennedy, J., concurring in the judgment).

A statute which provides that, when a jury deadlocks 11-1 for death, the decision of the one prevails over the decision of the eleven would throw away these important values. Congress has the power to enact such a statute, but courts should not lightly assume it has done so. The presumption should work the other way.

II. 18 U. S. C. § 3593 allows the trial court to impanel a new jury if a jury deadlocks over the sentence.

A. Statutory Text.

The claim that the inability of the jury to agree on a unanimous verdict eliminates the possibility of a death sentence is inconsistent with the text of the relevant statutes. The relevant language is found in two portions of 18 U. S. C. § 3593 and in 18 U. S. C. § 3594. When read together in their proper context, these three provisions provide unambiguous textual support for the Court of Appeals' decision. See *Conroy* v. *Aniskoff*, 507 U. S. 511, 515 (1993) (statute must be read as a whole as the meaning of the language depends upon its context).

The first pertinent provision is 18 U. S. C. § 3593(e), which sets forth the process by which the jury comes to its sentencing recommendation. Subdivision (e) begins by describing the sentencer's duty to weigh the aggravating and any mitigating factors and thus determine whether death is appropriate. This provision concludes with the first relevant passage:

> "Based upon this consideration [of aggravating and mitigating factors], the jury *by unanimous vote*, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without the possibility of release or some other lesser sentence." (Emphasis added.)

This establishes a unanimity requirement for any jury-imposed sentence. "Unanimous vote" comes before "shall recommend," thus requiring all recommendations made under this section to be unanimous. Since the jury can recommend any possible sentence under this provision ("death, to life imprisonment without possibility of release, or some lesser sentence"), any sentence recommendation by a jury must be unanimous.

Section 3593(e) does not, however, explain what shall be done if the jury cannot reach a unanimous recommendation. Defendant looks to another statute, 18 U. S. C. § 3594, for that answer:

> "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

Defendant focuses upon the term "otherwise." He asserts that since a hung jury is a result other than a recommendation of death or life without parole, it must be one of the results encompassed by the "otherwise" clause. See Brief for Petitioner 34. A hung jury would require a life-without-release sentence if that was the minimum and some lesser sentence if a lesser sentence is authorized. See Brief for Petitioner 35, and n. 27.

The first problem with this reading of the statute is its potentially absurd result. If a jury was deadlocked at eleven votes for death and one vote for life without parole, the court would seemingly be required to sentence defendant to some sentence "lesser" than these two options in any case where a lesser sentence is authorized. Under defendant's expansive reading of this clause, the court would thus be forced ("the court

shall impose," *ibid.* (emphasis added)) to impose a sentence less severe than the least any juror thought appropriate. As this Court long ago recognized:

> "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration . . . of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892); see also *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989).

Congress could not have intended the absurd result which defendant's reading mandates.

The last sentence of section 3594 does provide a possible way to alleviate this absurdity:

> "Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

This sentence provides a way for a court to impose a life without possibility of parole sentence if the "lesser sentence" could be life. This reduces but does not eliminate the possibility of the above-mentioned absurd result. Since the last sentence of section 3594 is permissive, not mandatory, the trial court would still be authorized to impose "any lesser sentence" even if no juror agreed with that sentence.

Defendant's interpretation of section 3594 has additional textual problems. Section 3593(b) allocates whether the sentencing hearing is before a judge or jury. The relevant portion states that:

> "The hearing shall be conducted —
>
> "(1) before the jury that determined the defendant's guilt;
>
> "(2) before a jury impaneled for the purpose of the hearing if —

> ". . . (C) the jury that determined the defendant's guilt was discharged for good cause . . . ."

An inability to reach a unanimous verdict is good cause to discharge the jury and impanel a new one. Generally, it is within the discretion of the trial court to declare a mistrial if the jury cannot agree on a verdict. See, *e.g.*, 26 J. Moore, et al., Moore's Federal Practice § 631.11[1], pp. 631-33 (3d ed. 1998); *United States* v. *Kramer*, 955 F. 2d 479, 490 (CA7 1992). A hung jury constitutes a "manifest necessity" to terminate the trial and retry defendant without violating the Double Jeopardy Clause. See *Richardson* v. *United States*, 468 U. S. 317, 323-324 (1984). A hung jury easily satisfies any reasonable definition of "good cause," particularly in light of the strong policy reasons for encouraging unanimous verdicts in capital sentencing. See part I, *ante*, at 4-12.

As the federal capital sentencing procedure established in section 3593(b) contemplates retrying the penalty phase if the first sentencing jury cannot reach a unanimous verdict, the deadlocked jury does not come within section 3594's "otherwise" clause. Text cannot be read in isolation; "a statute is to be read as a whole . . . ." *King* v. *St. Vincent's Hosp.*, 502 U. S. 215, 221 (1991). " 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate, take their purport from the setting in which they are used . . . .' " *Ibid.* (quoting *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2 1941) (L. Hand, J.)). Defendant's "otherwise" cannot be read alone. That term and the following sentence must be read in the context of the entire statutory scheme.

Section 3594's "otherwise" clause is best read as applying only to those unanimous recommendations of sentences other than death or life without parole. This interpretation avoids the possible absurd result from applying the "otherwise" clause in a jury deadlocked between death and life without parole. See *ante*, at 13. This reading is also harmonious with the language following "otherwise"—"the court shall impose any lesser

sentence that is authorized by law." 18 U. S. C. § 3594. Since the jury has already recommended some "lesser sentence," there will be much less tension between the jury's recommendation and the court's sentence than under defendant's reading of this statute.

The doctrine of lenity does not change the analysis. This doctrine is not an ironclad rule. Instead, it operates more like a gentle nudge, pushing a closely balanced interpretation of an unquestionably ambiguous statute towards defendant. It

> "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the act,' *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), such that even after a court has ' "seize[d] every thing from which aid can be derived," ' it is still 'left with an ambiguous statute.' " *Chapman* v. *United States*, 500 U. S. 453, 463 (1991) (quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805))).

The present case does not involve such unsolvable ambiguity.

In addition, the purpose of the rule of lenity is to ensure that the law gives people fair warning as to what the law prohibits and what the penalties are for violations. *United States* v. *Lanier*, 520 U. S. 259, 266 (1997). It is closely related to the *Ex Post Facto* Clause and the due process rule of *Bouie* v. *City of Columbia*, 378 U. S. 347, 353-354 (1964). See *Lanier*, 520 U. S., at 266-267. These related "fair warning" rules simply do not apply to matters of procedure; they are limited to substantive law. Legislatures and courts can and do change procedure "retroactively" to the detriment of criminal defendants. See *Miller* v. *Florida*, 482 U. S. 423, 433 (1987) ("no *ex post facto* violation occurs if the change in the law is merely procedural"); *Teague* v. *Lane*, 489 U. S. 288, 311 (1989) (plurality opinion) (applying new rule on "new rules" to pending case). In civil matters as well, the rule of statutory construction that raises a presumption against retroactivity does not apply to "[c]hanges in procedural rules" which "regulate secondary rather than

primary conduct . . . ." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 275 (1994). The reason, again, is the "diminished reliance interests in matters of procedure." *Ibid.*

The rule of lenity shares its basic purpose with these kindred doctrines, and it should share the same limitation. It has little or no application to rules of procedure; it applies to the rules that define crimes and establish punishments. Statutes of procedure should be construed evenhandedly, without favortism to either side.

In summary, section 3593(e) gives the jury three options on the sentence and requires it to reach a unanimous verdict on the choice. Section 3594 addresses only the final product of the jury process, instructing the trial court what to do with each of the three permitted outcomes. It does not address the consequences of the jury's inability to reach unanimity. That issue is addressed by section 3593(b)(2)(C), which provides for a second jury.

B. Legislative History.

In part II A of his brief, defendant argues that the legislative history of the statute supports his interpretation. Yet he does not cite any history of the bill that actually passed. Instead, he cites a report on another bill. See H. R. Rep. No. 103-467, 103d Cong., 2d Sess., 9 (1994) (report accompanying H. R. 4035). A weaker argument on legislative history is difficult to imagine.

The language in question did not originate with H. R. 4035, which was the subject of this report. Substantially the same language goes back at least as far as Senate Bill 32 in 1989. See, *e.g.*, S. Rep. No. 101-170, 101st Cong., 1st Sess., 10-12 (1989). H. R. 4035 and its committee report reached the House floor, 140 Cong. Rec. H2217 (daily ed. April 12, 1994), and went no further. That is the last mention of it in the Congressional Record.

> "The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions

of the bill and the reasons for the committee's recommendation that the bill should become law." *Chicago* v. *Environmental Defense Fund*, 511 U. S. 328, 345, n. 7 (1994) (Stevens, J., dissenting).

The premise that legislators are aware of and rely on the committee report has been questioned even when the report relates to the same bill. See *United States* v. *R. L. C.*, 503 U. S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment). Perhaps this premise, like that of jurors following their instructions, see *ante*, at 8, is accepted more as a practical matter than on the belief it is true. The premise loses *any* connection with reality, though, when the report in question relates to a bill which was neither the origin of the language nor the bill actually voted on. All we have here is an isolated statement buried in a committee report on a bill that went nowhere, interpreting language that had been bouncing around Congress for half a decade.[5]

United States v. *Gonzales*, 520 U. S. 1 (1997) is instructive on the limitations of legislative history. In that case, the question was whether a federal firearms sentence could run concurrently with a state sentence, despite the plain language of the statute forbidding concurrent running. *Id.*, at 2-3. In the present case, the question is whether the jury can produce a binding result without being unanimous, despite the unequivocal statutory command that it decide on the sentence "by unanimous vote." See 18 U. S. C. § 3593(e).

In *Gonzales*, as in the present case, the defendant relied on a "snippet of legislative history." 520 U. S., at 6. (Unlike the present case, Gonzales was at least relying on the history of the bill that actually passed. *Ibid.*) The Court was unimpressed. The two statutes in question "clash only if we engraft onto

5. In part I of this brief, we cite reports and hearings on some earlier bills. Lest we be accused of inconsistency, we note at this point that we cite these materials only for general policy issues. We make no claim that they are definitive legislative history of H. R. 3355.

§ 924(c) a requirement found only in a single sentence buried in the legislative history . . . . We therefore follow the text, rather than the legislative history, of § 924(c)." *Id.*, at 7-8.

Similarly, defendant Jones asks the Court to use a single sentence of legislative history to make section 3594 contradict the clear command of section 3593(e), that only a unanimous jury can decide the sentence. The Court's response should be the same. The statutes can and should be construed in a manner which makes them consistent with each other. The isolated snippet of history, an interpretation by a committee staffer buried in a report on a different bill never voted on by the House, should be brushed aside as inconsequential.

CONCLUSION

The decision of the Court of Appeals, to the extent it rejected defendant's proffered instruction on the consequences of jury deadlock, should be affirmed.

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Respectfully submitted,

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